UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT MOORE, *et al.*,	)	
	)	
Plaintiffs.	)	
	)	
v.	)	Case No. 20-1027 (RCL)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

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

COME NOW plaintiffs Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter, under Rule 56 of the Federal Rules of Civil Procedure, and respectfully move this Court for entry of Summary Judgment in their favor, and oppose defendant CIA's motion for summary judgment.

In support of this relief, plaintiffs submit their attached *Memorandum of Points and Authorities*, together with Plaintiffs' *Statement of Facts*, their *Response to Defendant's Statement of Facts*, and the affidavits of Bob Smith, Robert Moore, Mark Sauter, and Bethany Hendershot.

Date: January 17, 2022.

Respectfully submitted,

/s/ John H. Clarke

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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF CROSS-MOTION FOR ENTRY OF SUMMARY JUDGMENT,
AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Plaintiff's FOIA Request (ECF No. 9-1 at 2) quotes a March 16, 1954 memorandum from Air Force Chief of Staff General Nathan Twining to CIA Director Allen Dulles. Twining wrote, "[A] substantial number of U.S. military personnel captured in the course of the Korean War are still being held prisoners by the Communist Forces. These individuals will not necessarily be retained in North Korea or Manchuria, but may be held elsewhere within the Soviet orbit." Twining asked Dulles:

> It is therefore requested that requirements be placed on appropriate operating organizations for clandestine and covert action to locate, identify, and recover those U.S. prisoners of war still in Communist custody. This action should take precedence over all other evasion and escape activities currently being planned or undertaken by the Agency in support of military requirements. It is further requested that any information collected pertaining to U.S. and other United Nations prisoners of war still in Communist custody be immediately forwarded to this Headquarters.

Dulles responded, "The Agency has had a continuing requirement for the development of information on the location of U.S. POWs. Any intelligence developed on this subject will be discussed promptly with headquarters, United States Air Force."

In his opening statement before the Senate Select Committee on POW/MIA Affairs, *Hearing on Cold War, Korea, WWII POWs,* Vice Chairman Bob Smith's remarks included:

> Regarding the Korean War, our investigators state, and I quote, "apparently reliable information from several former Soviet colonels now retired indicates that the Soviets did in fact participate in interrogations, and there appears to be a strong possibility that at least a handful of US POWs, possibly more, were transferred to Soviet territory during the Korean War."
>
> Internal documents and statements made at the time also show that our government believed that men were still alive in captivity, and until only a few months ago has kept that reality from the American people. It has covered up with a pattern of denial, misleading statements, and in some cases, lies, and by doing so with regard to the Korean conflict it broke its commitment with the people who put on the uniform to fight for the freedoms and protections that we and our allies enjoy today.

Smith Aff. ¶¶ 8, 11.

CIA's interest in the matter is well documented. "In fact," the CIA notes in a report produced in this case, "the National Defense Authorization Act for 1998" mandates that CIA systematically "provide intelligence analysis on matters concerning prisoners of war and missing persons:

> DPMO systematically requests that CIA, DIA, NSA, and the National Imagery and Mapping Agency (NIMA) provide required information. In fact, the National Defense Authorization Act for 1998 (Public Law 105-85), Section 934, states that:
>
> > The Director of Central Intelligence in consultation with the Secretary of Defense shall provide intelligence analysis on matters concerning prisoners of war and missing persons… to all departments and agencies of the Federal Government involved in such matters.
>
> *A Review of the 1998 National Intelligence Estimate on POW/MIA Issues of the Charges Levied by A Critical Assessment of the Estimate*, DOD/CIA, Feb. 2000. *Hendershot Aff*. Exhibit A at Bates 113.[1]

The CIA has a long history of obdurate behavior regarding its intelligence on the issue. During the Korean War phase of hearings before the Senate Select Committee, Vice Chairman Smith quoted a government official as having testified "there is no evidence to suggest that any U.S. personnel were not released from captivity." Exasperated, after seeking disclosure for "eight years" (in 1992—30 years ago), Senator Smith continued:

> Now that's just, I mean, I just don't understand people in responsible positions coming up here to the Hill and saying that, that kind of thing, and I, I don't want to dispute it because I've been through that for eight years with you people, I don't have the desire to dispute it, as I said in my opening

[1] *See also Smith Aff*. ¶ 4:

> In the fall of 1997, Congress passed, and the President signed into law, the National Defense Authorization Act for fiscal Year 1998, which included a provision that I authored that required the Director of Central Intelligence to "provide analytical support on POW/MIA matters."

> statement the facts speak for themselves, the evidence speak for themselves, for itself, and it's time for you people to come up here to accept that evidence and begin to move to the next step, which is to find out what happened to these people and where they are. That's what we gotta start doing. So why don't you just admit that you've got the evidence.

I. Inadequate Searches and Reviews

CIA provided its Declaration of Vanna Blaine, ECF No. 21-2 ("*Blaine Decl.*"), to justify the adequacy of the searches conducted by the Agency.

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). 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).

Summary judgment in the government's favor would not be appropriate here.

A. Failure to Search for Records Reasonably Described

Here, six of plaintiff's items seek disclosure of underlying intelligence material upon which CIA reports were based. Plaintiffs had submitted those reports with their requests.

For these items, the CIA declined to conduct any search, asserting that the request was not reasonably described. This claim is disingenuous.

In Item 2, for example, plaintiffs attached a *CIA Information Report* that cites at least four underlying reports:

> Request 2
> The subject of the attached, redacted, version of the January 5, 1952, *CIA Information Report*, is "Preparations for Exchange of United Nations Prisoners in Central and South China." It relates that, "on 18 December, 13 American and 8 British prisoners of war were transferred," that **a source "gave names**," that "**another source** referred to American prisoners in the former US consulate," that there is "**another report** referring to US prisoners in the Canton area," and there is "**a recent report** from yet another source…." Please provide an unredacted copy of this Report, together with all intelligence material upon which it was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports. (Emphasis supplied.)

The *Information Report* cites the reports upon which it is based, contrary to CIA's view. *See Blaine Decl*., ECF No. 21-2 ¶ 23: "For Item 2… CIA determined that Plaintiffs' additional request for ""intelligence material upon which [the report] was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports' is not reasonably described, as required by the FOIA statute, and, as such, did not conduct any further search related to this request."

The FOIA request is reasonably described. So too with Requests 7, 8, 9, 11 and 14,[2] notwithstanding the CIA's response to contrary.

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[2] Request 7: An unredacted version of the attached July 17, 1952, three page *CIA Information Report*, the subject of which is "Prisoner-of-War Camps in North Korea and China," subtitled "War Prisoner Administrative Office and Camp Classification," together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports. CIA response *id.* ¶ 26, same.
Request 8:
An unredacted copy of the attached December 31, 1953, *CIA Information Report*, regarding a USSR interrogation center in Korea, where, "after interrogation PWs were taken to the USSR," together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.

The seventh such response is to Item 3, seeking decidedly responsive records. Plaintiffs submitted with Item 3 a *CIA Cross Reference Sheet* titled, "Location of Certain Soviet Transit Camps for POW from Korea," and sought, *inter alia*, the referenced "POW information." This CIA document relates to where the information had been "routed." And it provides "cross reference" and "classification" numbers. Thus, the record provides ample information from which CIA could search for these records, and the request itemizes this information.[3] Yet, CIA responded that it "did not conduct a search related to parts (c)-

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CIA response *id.* ¶ 27, same.
Request 9:
An unredacted copy of the attached March 24, 1954, *CIA Information Report* relating that "some PWs listed as missing were in fact turned over to the Soviets," and "will never be released because they will have learned too much about Soviet PW handling techniques," together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.
CIA response, *id.* ¶ 28, same.
Request 11:
The unredacted, and complete, version of the April 27, 1954, *CIA Information Report* relating "information regarding the presence of US prisoners captured during the Korean War" in camps in Komsomolsk, Magadan, Chita, and Irkutsk, USSR, together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports. The first page of this three-page Report is enclosed.
CIA response, *id.* ¶ 29, same.
Request 14:
A complete, and unredacted version of the attached March 9, 1988, *CIA Memorandum* to "US Army Chief, Special Office for Prisoners of War and Missing in Action," referencing two 1980 sightings and one 1988 sighting of "31 Caucasians, possibly American prisoners from the Korean war, in the fall of 1979," together with all intelligence material upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.
CIA response *id.* ¶ 32, same.

[3] Request 3
The "main subject" of the attached July 15, 1952 *CIA Cross Reference Sheet* is "Location of Certain Soviet Transit Camps for POW from Korea, Classification Number 383.6 Korea." It reads:

(f) of the request, as CIA believes the scope of the requested items for those parts was not reasonably defined." *Id.* ¶ 24.

The FOIA specifies two requirements for an access request: It must "reasonably describe" the records sought and it must be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(A).

The key to determining whether a request satisfies the first requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them. Courts have recognized that the legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort." *See, e.g., Truitt v. Dep't of State*, 897 F.2d 540, 544-45 (D.C. Cir. 1990), discussing legislative history as of requirements for describing requested records. *See also Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982), holding that request encompassing over 1,000,000 computerized records to be valid because "[t]he

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Date of Basic Communication: 15 July 52 f/w
Date of Basic Document: 24 June 53
Brief Summary: In December it was known that camps for POW captured by the Communists in Korea had been established, etc. 3-plc

Classifier 488	Routed to: C.I. File
Typist 488	Date of Classifying 17 Aug 59
Cross Reference Numbers:	040 Central Intelligence Agency

Please produce the referenced:
(a) July 15 1952 "Basic Communication;"
(b) June 24, 1953 "Basic Document;"
(c) Information described as "etcetera;"
(d) POW information in, or otherwise "Routed to, C.I. File;"
(e) POW information related to or bearing the "Cross Reference Number 040;"
(f) POW information related to or bearing the "Classification Number 383.6 Korea."

linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested,'" also quoting legislative history. *See also Kowalczyk v. U.S. Dep't of Justice,* 73 F.3d 386, 388 (D.C. Cir. 1996) (same, quoting *Yeager*).

Defendant's position is further undermined by its sworn statement in *Sauter v. Dep't of State, et al.*, 17-1596 (hereinafter "*Sauter*"), where the CIA wrote that, "[i]n cases where records provided references to additional responsive documents, IMS professionals followed up on those leads and conducted additional searches based on those terms or references." *Shiner Decl*. ECF No. 30-8, ¶ 10.

B. Failure to Search Operational Records

The CIA Information Act of 1984, 50 U.S.C. § 3141(a) ("CIA Act"), authorizes the Director of the Central Intelligence Agency to designate certain Agency records as "operational files." Under the FOIA, this makes the records exempt not only from disclosure, but even from search and review. The CIA Act defines the term: "In this section, the term "operational files" means—

(1) files of the National Clandestine Service which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;
(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and
(3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

50 U.S.C. § 3141(b), "Operational Files" Defined.

Defendant's Motion for Summary Judgment, ECF No. 21 ("*Motion*") cites the CIA Act at 19-20 and 23, but not § 3141, and is silent on the subject of the exclusion from search and review of all records generated by its core function. While the government's

declaration does not identify any components that it searched, it does reveal that it excluded its operational file repositories:

> The CIA conducted thorough and diligent searches of relevant systems of records that were reasonably calculated to find documents responsive to Plaintiffs' request (if such records existed). Given the age and type of records Plaintiff requested, CIA information management professionals searched all Agency records in three different records systems. Those systems encompass: (1) indices of all archived hard-copy Agency records; (2) electronic versions of all Agency records that have been reviewed and/or compiled for potential public release; and (3) multiple **repositories of non-operational intelligence** reporting from various sources.

Blaine Decl., ECF No. 21-2 ¶ 20. Emphasis supplied.

Among the CIA components where operational files may be retained are the National Clandestine Service (now known as the Directorate of Operations), the Directorate for Science and Technology, and the Office of Personnel Security. Here, defendant failed to search its systems records associated with these components. It is required to do so. *See Hall et al. v. CIA*, 268 F.Supp.3d 161, involving disclosure of aged POW records of Vietnam War era Americans, where this Court held that the CIA had "fail[ed] to demonstrate how such dated records can reasonably be considered operational under the statute:"

> Although specific imagery, intelligence reports, and operations, even those more than 60 years old, may well still be classified, the Court cannot be left to speculate about whether such records, if they exist, are among those the CIA Director has designated as operational files pursuant to his statutory authority. *See* Def Reply and Opposit'n [272] at *12 (representing that plaintiffs "have identified only the [a]gency's operational files" in their argument that the CIA's search has been inadequate). And, although the Court is strongly inclined to defer to the CIA's determinations as to classification and Section 3141, the present record fails to demonstrate how such dated records can reasonably be considered operational under the statute.

So too here.

C. Failure to Review Redacted Records

Plaintiffs' FOIA request states: "These requests do not seek information that appears in any record on the CIA website, or on any Department of Defense website, but only if such records were released in full, with no redactions. In other words, please process redacted records." *FOIA Request*, ECF No. 9-1 at 2.

Defendant's review is not complete until it has re-reviewed responsive, previously released, redacted, records. This is CIA practice, as it acknowledged in *Sauter*. *See Supp. Shiner Decl.,* ECF No. 45-3 ¶ 9:

> As to Plaintiffs' second and third questions, CIA routinely reviews documents that have been published in its Freedom of Information Act Electronic Reading Room ("FOIA ERR") for material responsive to FOIA requests. When responding to a FOIA request, CIA reviews documents previously released in part to determine whether the documents include additional material that can be released. If CIA determines that a responsive document previously released in part contains additional information that can be released, CIA will process and release the document accordingly. If CIA determines that a previously released responsive document does not contain any additional material that can be released, either because the existing redactions are proper or because the document has been released in full, it will inform the requester of the existence of the responsive document and its location.

See also CIA Reply, ECF No. 45 at 3 (same).

But in this case, the CIA did not review any such previously released records, nor did it "inform the requester of the existence of the responsive document and its location."

Senator Bob Smith's 1992, 54-page Report, *Chronology of Policy and Intelligence Matters Concerning Unaccounted for U.S. Military Personnel at the end of the Korean Conflict and During the Cold War*, is reprinted in his sworn affidavit, submitted herewith ("*Smith Aff.*"). It cites 23 CIA records. Thirteen of these records, generated in 1951-52, appear on the CIA's website, and are submitted as Exhibit B to plaintiffs' *Hendershot Aff.* These records are heavily redacted. *See Hendershot Aff.* ¶¶ 6-9. None of these records were

processed or released in this case. That review would have been of records up to 70 years old, and which were redacted, and released, up to 22 years ago.

The passage of time is integral to the question of whether exemptions founded on national security concerns are properly asserted, and defendant must review *all* responsive records that were previously released in redacted form.

E. Failure to Adequately Describe Search

CIA relates that it searched in three, nondescript, records systems.[4]

One records system searched states only that it was of "indices of all archived hard-copy Agency records." The system is not named. There is no description of the number of indices, or how they are organized, or whether there are sub-indices, or how many indices were searched, or whether any index referred to a potentially relevant series, or whether any series was searched, or which CIA component or components the repository served.

Second, CIA states that it searched "electronic versions of all Agency records that have been reviewed and/or compiled for potential public release." Given the CIA's recalcitrance in releasing the records at issue, plaintiffs would not anticipate this review to

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[4] *Blaine Decl.*, ECF No. 21-2 ¶ 20:

> The CIA conducted thorough and diligent searches of relevant systems of records that were reasonably calculated to find documents responsive to Plaintiffs' request (if such records existed). Given the age and type of records Plaintiff requested, CIA information management professionals searched all Agency records in three different records systems. Those systems encompass: (1) indices of all archived hard-copy Agency records; (2) electronic versions of all Agency records that have been reviewed and/or compiled for potential public release; and (3) multiple repositories of non-operational intelligence reporting from various sources. Where hard-copy files were identified as possibly containing relevant records, CIA information management professionals hand-searched those records in their entirety without the use of terms or other filtering mechanisms.

result in disclosures. Moreover, defendant appears not to have reviewed *any* of the aforementioned 23 CIA records which are the subject of Exhibit B to the *Hendershot Aff.*

Lastly, CIA relates that it searched "multiple repositories of non-operational intelligence reporting from various sources." Why are "multiple repositories" characterized as a single "record system?" What are these "repositories?" How many are there? Are these records indexed, and, if so, how? They are repositories for records of which CIA components?

The affidavits or declarations submitted to meet this 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").

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.

(In *Sauter*, by contrast, defendant did disclose which record systems are repositories for which of its components.[5])

CIA also failed to state how many man-hours were devoted to its searches.

And defendant is not limited to searching "non-operational" repositories, as discussed above.

D. Failure to Search Records Housed at the National Archives

The CIA addressed the issue of the search of records accessioned to the National Archives in *Sauter*. *See Supp. Shiner Decl.,* ECF No. 45-3 ¶ 8:

> In response to Plaintiffs' first question, CIA, like other government agencies, routinely accessions documents to NARA. When a document has been accessioned by CIA to NARA, the document is no longer in CIA's possession and is no longer considered an Agency record for purposes of FOIA. CIA does not have the ability to search for, review, or release documents that are in NARA's possession. Accordingly, CIA is unable to determine whether documents responsive to Plaintiffs' request have been accessioned to and are currently in NARA's possession.

Plaintiffs aver that CIA has the ability to search for, review, and release, documents housed at NARA.

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[5] *See Sauter v. Dep't of State, et al.*, 17-1596, *Shiner Decl*. ECF No. 30-8, ¶ 9-10:

> Here, the CIA searched… the records held by the Directorate of Support… the Director's area … the history staff's files… as well as records held by the Office of Congressional Affairs ("OCA") … The Directorate of Support provides the Agency with mission-critical services… Director's area is a cluster of offices under the Director of the CIA, such as the Office of General Counsel, the Office of Public Affairs and the Office of the Inspector General… the CIA History Staff… is responsible for developing and maintaining the Agency's corporate memory and keeps its files on internal share drives as well as hard copy files kept in the CIA's Agency Archives and Records Center (AARC)… OCA maintains a record of all Agency interactions with Congress.

1. Ability to Search and Review

While the CIA in *Sauter* declared that it could not search records housed at NARA, in *Hall et al. v. CIA*, CA 04-814, it declared that it had, in fact, searched records housed there:

> Moreover, even though the Senate Select Committee's records were exempt from FOIA search and release, the CIA agreed to search the Committee's records (which had been sent to the National Archives and Records Administration ("NARA") for declassification), and released over 1,000 records. *See* 11/29/17 *Shiner Decl*. ¶¶ 14-15 (ECF No. 295-2). As a result of these search efforts, which were appropriately cabined to the CIA's non-operational files, the CIA did not locate any of the alleged additional records raised by the Plaintiff. Therefore, the CIA denies having located or being made aware of the existence of additional non-operational records allegedly shown to Congress. *Shiner Decl*. ¶ 8.

Defendant's Supplement to its Motion for Summary Judgment, ECF No. 335 at 6.

2. Ability to Release

Exhibit C to the *Hendershot Aff*. are two 1994 "Withdrawal Notices," reflecting the withdrawals by the CIA from the publicly available records at the National Archives, on the grounds that these records contain "Security-Classified Information." Both Notices have a 16-digit "FOIA Retrieval number."

Defendant's view would be that the CIA has the power to withdraw records from public view, but it has no power to authorize their release. Plaintiffs disagree.

While 44 U.S.C. § 2108, *Public Printing and Documents*, *Responsibility for custody, use, and withdrawal of records*, does state that "[t]he Archivist shall be responsible for the custody, use, and withdrawal of records," the transferring agency can change the restrictions that it assigned when the records were transferred. Under § 2108 (a), the Archivist follows the transferring agency's determination regarding nondisclosures (if the Archivist concurs). Later, if either the Archivist or the agency seek to change the designations in effect, the parties need to concur. Here, the two withdrawal slips reflect

that the CIA withdrew records based its determination that they contained "security classified information." The CIA has ability to reclassify those records for public release.

So too with all the other responsive records accessioned to NARA.

CIA would refer plaintiffs to NARA to conduct this search. However, that effort has not been successful, due to lack of NARA's resources, and the CIA's failure to provide NARA the relevant indices. *See* Exhibit D to *Hendershot Aff*., November 5, 2020 letter from the National Archives in response to FOIA request for many of the same records that plaintiffs seek in this case. The Archivist identified five series of records where CIA records may be found,[6] but declined to conduct a search. NARA explained, "While some files were indexed before they were transferred to NARA, many were not. The vast majority of records in our holdings are not described at the item/document level and identifying specific documents or specific information requires extensive research that we are not staffed to perform." Exhibit D at 2.

"Many" of CIA's files had not been indexed "before they were transferred to NARA," and so NARA is unable to target its search. The CIA knows where to search. The CIA can, and has, searched its records housed at NARA. NARA has insufficient resources to conduct an untargeted search.

Under 36 CFR 1235.12 (b), permanent records "must be transferred to the National Archives of the United States… when the records have been in existence for more than 30 years." Thus, it would appear that CIA transfers records to the National Archives, and thereafter asserts that is has no ability, or responsibility, to search them—and the Archives

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6 Records Relating to the Historical Review Program 1947–1981 (three series), the History Review Program 1947–1981, and National Intelligence Surveys. *See Hendershot Aff*. Exhibit D at 3-4.

asserts that it does not have the resources to conduct the search in the absence of the CIA's indices. This conduct by the CIA frustrates the Freedom of Information Act. The CIA should be ordered to search its records accessioned to the National Archives.

II. Improper Reliance on *Collateral Estoppel*

Defendant cites *Sauter* for the proposition that, because CIA asserted a *Glomar* response in that case, which plaintiffs did not challenge, that issue is now barred. Defendant's position is invalid. As the court explained in *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 795 (D.C. Cir. 2019), "Specifically, collateral estoppel bars successive litigation of an issue of fact or law when (1) the issue is actually litigated; (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the determination was essential to the judgment, and not merely dictum."

In *Sauter*, the issue had not been "actually litigated," as defendant observes: "Plaintiffs did not challenge the *Glomar* response." *Motion* at 10. *See also Sauter Order*, ECF No. 63: "In response to the motion, plaintiffs filed a notice of concession on December 12, 2019. The Court therefore GRANTS the motion for summary judgment as conceded."

Thus, *collateral estoppel* is unavailable to the CIA, and defendant's observation that "some of [the prior requests] are similar to requests in this civil action" (*Motion* at 10) is irrelevant. The requests are similar in that they all concern the issue of CIA's knowledge of POWs held in Communist hands post Operation Big Switch in 1953, which resulted in the repatriation of 3,597 Americans. But the requests are hardly “the same.” Defendant cites

no authority in support of its *collateral estoppel* defense, and uses the term only once, in the *Blaine Decl*.[7]

III. History of Unwarranted Nondisclosures

The veracity and thoroughness of the CIA's declarations should be evaluated in the greater context.[8]

A. Executive Order 13526

On December 29, 2009, the President issued Executive Order 13526. It prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Specific time limits are mentioned for different kinds of information, but there is also a provision that information that still needs to be classified can stay classified, when certain conditions are met. Mechanisms are outlined for periodic reevaluation of the need to classify information.

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[7] *Blaine Decl*., ECF No. 21-2 ¶ 25:

> For Item 4: No search was conducted related to this request under collateral estoppel as this request is identical to a previous FOIA request submitted by Plaintiffs, assigned reference number F-2017-02391. We addressed this request in our March 28, 2018 correspondence with plaintiffs and thus did not re-address it in this FOIA request.

[8] *See, e.g., Hendershot Aff*. Exhibit A at Bates 27, compared to record as submitted with *FOIA Request,* ECF No. 9-1 at 13, where CIA redacted the following, asserting Exemptions (b)(1) and (b)(3):

GRADING OF SOURCE						COLLECTOR'S PRELIMINARY GRADING OF CONTENT					
COMPLETELY RELIABLE	USUALLY RELIABLE	FAIRLY RELIABLE	NOT USUALLY RELIABLE	NOT RELIABLE	CANNOT BE JUDGED	CONFIRMED BY OTHER SOURCES	PROBABLY TRUE	POSSIBLY TRUE	DOUBTFUL	PROBABLY FALSE	CANNOT BE JUDGED
A	B	C	D	E	F	1	2	3	4	5	6

CIA's nondisclosures violate several provisions of E.O. 13526.

Under Section 3.3, *Automatic Declassification*, most of the records should have been automatically released long ago. That provision mandates release of records that are 50 years older "shall be automatically declassified," unless release "should clearly and demonstrably be expected to reveal… the identity of a confidential human source."[9] There is no national security exception for 50-year-old records.

The CIA is governed by Section 3.3 (a) for 25-year-old records that have "permanent historical value," as the records at issue do. They, too, "shall be automatically declassified." Here, too, the Agency may postpone release if it can, *inter alia*, "clearly and demonstrably" show that disclosure would "reveal the identity of a confidential human source," or "cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States."[10]

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[9] Sec. 3.3(h), *Automatic Declassification*:

(h) Not later than 3 years from the effective date of this order, all records exempted from automatic declassification under paragraphs (b) and (c) of this section shall be automatically declassified on December 31 of a year that is no more than 50 years from the date of origin, subject to the following:
  (1) Records that contain information the release of which should clearly and demonstrably be expected to reveal the following are exempt from automatic declassification at 50 years:
    (A) the identity of a confidential human source or a human intelligence source; or
    (B) key design concepts of weapons of mass destruction.

[10] Sec. 3.3 *Automatic Declassification.*

(a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that
  (1) are more than 25 years old and
  (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided in paragraphs (b)–(d) and (g)–(j) of this section. If the date of origin of an individual record

Under Section 1.4. *Classification Categories*, "Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security… in accordance with section 1.2 of this order, and it pertains to," *inter alia*, "intelligence activities (including covert action), intelligence sources or methods, foreign relations… including confidential sources."[11]

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cannot be readily determined, the date of original classification shall be used instead.

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:

* * *

(1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;

* * *

(6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States…

[11] Sec. 1.4. *Classification Categories.* Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

(a) military plans, weapons systems, or operations;
(b) foreign government information;
(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
(d) foreign relations or foreign activities of the United States, including confidential sources;
(e) scientific, technological, or economic matters relating to the national security;
(f) United States Government programs for safeguarding nuclear materials or facilities;
(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
(h) the development, production, or use of weapons of mass destruction.

Section 3.1. *Authority for Declassification,* mandates that "[i]nformation shall be declassified as soon as it no longer meets the standards for classification." Even if properly classified, "In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified**."**[12]

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[12] Sec. 3.1. *Authority for Declassification.*

(a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

(b) Information shall be declassified or downgraded by:

(1) the official who authorized the original classification, if that official is still serving in the same position and has original classification authority;

(2) the originator's current successor in function, if that individual has original classification authority;

(3) a supervisory official of either the originator or his or her successor in function, if the supervisory official has original classification authority; or

(4) officials delegated declassification authority in writing by the agency head or the senior agency official of the originating agency.

(c) The Director of National Intelligence (or, if delegated by the Director of National Intelligence, the Principal Deputy Director of National Intelligence) may, with respect to the Intelligence Community, after consultation with the head of the originating Intelligence Community element or department, declassify, downgrade, or direct the declassification or downgrading of information or intelligence relating to intelligence sources, methods, or activities.

(d) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified**.** When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure…

Most, if not all, of the information provided in the records was provided by individuals who are deceased. Moreover, given the age of these records, the need to protect the information is outweighed by the public interest in disclosure**.**

While the CIA does not address the foregoing provisions of E.O. 13526, it does quote the provision prohibiting continued classification to "prevent or delay the release of information that does not require protection in the interest of the national security."[13] *Blaine Decl*., ECF No. 21-2 ¶ 43.

B. Decennial Reviews

The CIA Act requires the CIA to review the exempted files every ten years to determine whether they can be removed from the exempted designations, on the basis of "historical value or other public interest… and the potential for declassifying a significant part of the information." 50 U.S.C. § 3141(g)(2).

50 U.S.C. § 3141(g), *Decennial Review of Exempted Operational Files*, states:

> (1) Not less than once every ten years, the Director of the Central Intelligence Agency and the Director of National Intelligence shall review the exemptions in force under subsection (a) to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

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[13] Sec. 1.7. *Classification Prohibitions and Limitations.*
(a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:
(1) conceal violations of law, inefficiency, or administrative error;
(2) prevent embarrassment to a person, organization, or agency;
(3) restrain competition; or
(4) prevent or delay the release of information that does not require protection in the interest of the national security.
(b) Basic scientific research information not clearly related to the national security shall not be classified.

> (2) The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.
>
> (3) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining the following:
>
> (A) Whether the Central Intelligence Agency has conducted the review required by paragraph (1) before October 15, 1994, or before the expiration of the 10-year period beginning on the date of the most recent review.
>
> (B) Whether the Central Intelligence Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.

The CIA has conducted four Decennial reviews. The first was in 1985 and the last in 2015. CIA's record of non-disclosures in this matter shows that it did not consider the "historical value or other public interest in the subject matter of the particular category of files" in conducting its Decennial reviews.

In this case, defendant produced 55 records. Fourteen were generated in 1952-55, five in 1981-88, and 26 in 1991-92. *Hendershot Aff*. ¶ 4. Here, a review of these records demonstrates the CIA's utter disregard of the "historical value or other public interest" under 50 U.S.C. § 3141(g)(2).

C. McCain Act

The McCain Act, or § 1082 *et seq*. of the *National Defense Authorization Act*, Dec. 5, 1991 (*as Amended* 1995 to include Korean War POW/MIAs) requires the CIA to provide the records at issue to the Secretary of Defense:

> Whenever after March 1, 1992, a department or agency of the Federal Government receives any record or other information referred to in subsection (a) that is required by this section to be made available to the public [POW information], the head of that department or agency shall

> ensure that such record or other information is provided to the Secretary of Defense, and the Secretary shall make such record or other information available in accordance with subsection (a) [to NARA] as soon as possible and, in any event, not later than one year after the date on which the record or information is received by the department or agency of the Federal Government.

Public Law 102-190 § 1082 (c) (2).

The McCain Act also calls upon the President to determine when "the fullest possible accounting has been made of all members of the Armed Forces and civilian employees of the United States who have been identified as prisoner of war or missing in action… to end[] the uncertainty for their families and the Nation."[14] No President has made that determination.

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[14] *Id*. § 1084: *Display of POW/MIA Flag*

(a) *Display of POW/MIA Flag*—The POW/MIA flag, having been recognized and designated in section 2 of *Public Law* 101-355 (104 Stat. 416) as the symbol of the Nation's concern and commitment to resolving as fully as possible the fates of Americans still prisoner, missing, and unaccounted for, thus ending the uncertainty for their families and the Nation, shall be displayed—
  (1) at each national cemetery and at the National Vietnam Veterans Memorial each year on Memorial Day and Veterans Day and on any day designated by law as National POW/MIA Recognition Day; and
  (2) on, or on the grounds of, the buildings specified in subsection on any day designated by law as National POW/MIA Recognition Day.

Public Law 102-190—Dec. 5, 1991 105 *Stat*. 1483

(c) *Specified Building for Flag Display*.—The buildings referred to in subsection (a)(2) are the buildings containing the primary offices of—
  (1) the Secretary of State;
  (2) the Secretary of Defense;
  (3) the Secretary of Veterans Affairs; and
  (4) the Director of the Selective Service System.

(c) *Procurement and Distribution of Flags*.—Within 30 days after the date of the enactment of this Act, the Administrator of General Services shall procure POW/MIA flags and distribute them as necessary to carry out this section.

(d) *Termination of Flag Display Requirement*.—Subsection (a) shall cease to apply upon **a determination by the President that the fullest possible accounting has been made of all members of the Armed Forces and**

IV. Exemptions

"The underlying facts are viewed in the light most favorable to the [FOIA] requester," *Weisberg v. Dept. of Justice,* 705 F.2d at 1350 (D. D.C. 1984), 705 F.2d at 1350, and the exemptions must be narrowly construed. *FBI v. Abramson,* 456 U.S. 615,630, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982). An agency claiming an exemption to FOIA bears the burden of establishing that the exemption applies. *Fed. Open Market Comm.. v. Merrill,* 443 U.S. 340, 352 (1979). The agency bears the burden of establishing that documents are properly classified as secret and thus clearly exempt from disclosure. *Founding Church of Scientology of Wash., D.C., Inc. v. Bell,* 603 F.2d 945, 949 (D.C. Cir. 1979).

A. Exemption (b)(1)

In cases involving national security equities, such as this one, there is generally significant overlap between the information covered by Exemption 1 and that covered by Exemption 3. *See Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C. Cir. 1981) (citing *Phillippi v. CIA,* 546 F.2d 1009 (D.C. Cir. 1976)).

Section 552(b)(1) permits nondisclosure of records that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
> (B) are in fact properly classified pursuant to such Executive order.

Defendant cites Executive Order 13526 and posits that the information is properly classified. However, E.O. 13526 does not help the CIA. As set forth above, it is defendant's

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> **civilian employees of the United States who have been identified as prisoner of war or missing in action** in Southeast Asia.
> (e) *POW/MIA Flag Defined*.—As used in this section, the term "POW/MIA flag" means the National League of Families POW/ MIA flag recognized officially and designated by section 2 of *Public Law* 101-355 (104 Stat. 416). (Emphasis supplied.)

burden to show applicability of the exceptions to the E.O.'s automatic declassification provisions for aged records that have "permanent historical value." Here, the CIA cannot show that declassification would:

(1) Reveal intelligence activities, sources or methods, to the detriment of national security ("reasonably could be expected to result in damage"), or

(2) "Clearly and demonstrably" be expected to reveal the identity of a human source, or

(3) Cause serious harm to relations between the United States and a foreign government.

The CIA has proffered no justification whatsoever for its claims of exceptions to the E.O.'s automatic declassification provisions. Rather, it simply declares that "the information concerns 'intelligence activities (including covert action), [or] intelligence sources or methods' and 'foreign relations or foreign activities of the United States' under section 1.4 of Executive Order 13526, and the disclosure of the information would result in damage to national security." *Motion* at 17-18.

Its declaration claims that the records "cover a range of Agency functions and operations, and contain classified information related to: the priority of intelligence activities and targets; methods of collection; and classified relationships." *Blaine Decl*. ECF No. 21-2 ¶ 44. But those claims would pertain to the present day, not a half-century ago. Today, contrary to the CIA's position, the release of this information could not "significantly impair the CIA' s ability to carry out its core missions of gathering and analyzing foreign intelligence and counter-intelligence and conducting intelligence operations, thereby damaging the national security." *Id*.

An agency's declaration explaining its withholdings is sufficient to support a claimed exemption if it: (1) is not conclusory; (2) is neither controverted by evidence in the record

nor by evidence of agency bad faith, *Shaw v. U.S. Dep't of State,* 559 F.Supp. 1053, 1056(D. D.C. 1983) (quoting *Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C. Cir. 1981)); and (3) describes the justification for withholding the requested records "in sufficient detail to demonstrate that the claimed exemption applies," *Carter v. U.S. Dep't of Commerce,* 830 F.2d 388, 392 (D.C.Cir. 1987).

Here, the CIA repeats the law, but does not state how it applies to the facts.

B. Exemption (b)(3)

Section 552(b)(3) permits nondisclosure of records that are specifically exempted from disclosure by statute if that statute:

> (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The CIA claims that Section 6 of the CIA Act mandates the withholdings, as it requires that the protect intelligence sources and methods from unauthorized disclosure. The CIA Act provides that the Agency is exempted from any law that requires the disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by CIA, or information relating to its core functions. *Motion* at 19-20.

"Specifically, the CIA withheld titles, names, identification numbers, functions, and organizational information related to CIA employees, which is protected from disclosure pursuant to Exemption 3 of FOIA." *Motion* at 20. But defendant does not differentiate between more recently employed individuals and those so employed up to 68 years ago.

The CIA also relies on the National Security Act's provision that "the Director of National Intelligence ("DNI") 'shall protect intelligence sources and methods from unauthorized disclosure.'" *Motion* at 19. CIA posits that these records—most of which are

circa 1950s—still contain sources and methods that if released would jeopardize national security.

With respect to Exemption 3 claims, the Court balances the inherent tension between the public's interest in government goings-on with the protection of an agency's legitimate, and statutorily recognized, need for secrecy in certain matters. *See Miller v. U.S. Dep't of Justice,* 872 F. Supp. 2d at 22 (D. D.C. 2012).

Defendant cannot meet its burden to withhold records on national security grounds.

C. Exemption (b)(6)

Seventeen of defendant's 55 records produced[15] redacted material under Exemption 6. *Hendershot Aff.* ¶ 11. Here too defendant ignores the age of these records. Most, if not all, of the officials whose names and identifying information appear in the documents at issue in this case are either retired or deceased. These circumstances further erode the viability of privacy protection. *See Campbell v. U.S. Department of Justice*, 193 F. Supp. 2d at 33: "[D]eath clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living."

Exemption 6 protects disclosure under the FOIA of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C § 552(b)(6). It has two prongs, requiring proof of both (1) the nature of the files and (2) that release would be a "clearly unwarranted" invasion of privacy. *Dep't of State* v. *Washington Post Co.,* 456 U.S. 595, 599-603, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982).

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15 Defendant states that it produced 35 records (6 documents in full, 29 documents in part" *Motion* at 11) because it counted distinct documents as one record. *See Hendershot Aff.* Exhibit A at 1-7.

The second step of an Exemption 6 analysis is to strike a "balance between the protection of an individual's right to privacy and the preservation of the public's right to government information." *Washington Post Co.,* 456 U.S. at 599. The "public interest" in the analysis is limited to the "core purpose" for which Congress enacted the FOIA, *i.e.*, to "shed light on an agency's performance of its statutory duties." *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989); *Fund for Constitutional Gov't* v. *National Archives and Records Serv.,* 656 F.2d 856, 862 (D.C. Cir. 1981).

In *Hall*, the issues concerned Vietnam era records, which ended in 1973, 20 years after the Korean War ended in 1953. The Court held that lower-level employees may be entitled to protection, but that interest fades considerably as decades pass:

> Although the Court understands the government's interest in protecting lower-level employees, *2d Shiner Decl*. at 14, or at least persons who were lower-level employees at the time of the relevant document's creation, the weight of that interest fades considerably as decades pass. Therefore, as to the non-CIA employees' names redacted under Exemption 6, the Court once again denies summary judgment to the CIA and grants summary judgment to plaintiffs.

Hall v. CIA, 268 F. Supp. 3d at 163 (D. D.C. 2017).

Government officials are not entitled to the same degree of privacy as private citizens. *Lesar v. United States Dept. of Justice*, 636 F.2d 472 (D.C. Cir. 1980). "In their capacity as public officials, FBI agents may not have as great a claim to privacy as that afforded ordinarily to private citizens, but the agent by virtue of his official status does not forego altogether any privacy claim in matters related to official business." *Id*. at 487. Information about federal employees therefore generally does not qualify for protection. *See Arieff v. Dep't of the Navy,* 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (declining to protect

information about a large group of individuals); *Aguirre* v. *SEC,* 551 F.Supp.2d 33, 54 (D.D.C. 2008) ("Correspondence does not become personal solely because it identifies government employees.").

In *Morley v. CIA,* the CIA's declaration explaining the invocation of Exemption 6 stated only that "disclosure would constitute a clearly unwarranted invasion of the personal privacy of third parties." *Morley,* 508 F.3d at 1128. The D.C. Circuit held that the disclosure of biographical information does not necessarily invade an individual's privacy and that summary judgment was inappropriate where the agency "failed to explain the extent of the privacy interest or the consequences that may ensue from disclosure." *Id.* Here, the CIA statement of consequences has no application to the aged records at issue:

> Here, nineteen of the documents at issue contain personally identifiable information, including names, signatures, and other identifying information, in which the individuals maintain a cognizable privacy interest. The release of the redacted names and other identifying information is reasonably likely to subject those individuals or those associated with them to increased harassment or threats based on their association with the CIA.

Blaine Decl. ECF No. 21-2 ¶ 62.

"Under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Nat'l Ass'n of Home Builders* v. *Norton,* 309 F.3d 26, 32 (D.C. Cir. 2002), and the CIA has not met its burden as to any of the Exemption 6 claims. Here, identifying information of non-CIA employees, or deceased CIA employees, should not be withheld on privacy grounds.

D. Segregation

The disclosure provisions of the Freedom of Information Act, 5 U.S.C. § 552, require federal agencies to disclose all "agency records" that are not exempt from mandatory disclosure under one of the Act's exemptions. Thus, the "processing of records" in relation

to FOIA exemptions is a fundamental part of FOIA administration. In administering the Act, however, agencies must not overlook their obligation to focus on individual record portions that require disclosure. This focus is essential in order to meet the Act's primary objective of "maximum responsible disclosure of government information."

The obligation to consider individual portions of records for disclosure under the FOIA is placed upon agencies by the explicit language of the statute itself. Subsection (b) of the Act, which enumerates the exemptions from disclosure, concludes with the following overall requirement:

> Reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

U.S.C. § 552(b) (final sentence)

The CIA's explanation is limited to the statement, "In evaluating the responsive documents, the CIA conducted a document-by-document and line-by-line review and released all reasonably segregable non-exempt information…" *Blaine Decl*. ECF No. 21-2 ¶ 65. This is insufficient. As the Court observed in *Hall v. C.I.A*., 668 F.Supp.2d 172 (D. D.C. 2009):

> The CIA's *Vaughn* index does not provide information sufficient for the Court to review its compliance with FOIA's requirement that reasonably segregable portions of records be released. The DiMaio Declaration does address the issue, but statements referring to "all documents," DiMaio Decl. ¶ 37, do not provide the specificity necessary to conduct a segregability analysis…. The 2006 *Vaughn* index does not mention segregability at all. FOIA does not require explanations "rich with detail or lavish with compromising revelations," but some specificity is necessary. *Animal Legal Defense Fund, Inc. v. Dep't of Air Force,* 44 F.Supp.2d 295, 302 (D.D.C.1999). The Court therefore concludes that the CIA's supplemental filing must include more information about the segregability of documents, "`specify[ing] in detail which portions of the document are disclosable and which are allegedly exempt,' ... mak[ing] specific findings for each document withheld[,] ... and

`correlat[ing] claimed exemptions with particular passages.'" *Id.* (quoting *Schiller,* 964 F.2d at 1209, 1210).

VII. Glomar Responses

A *Glomar* response allows a Government agency to refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception.

Defendant asserted a *Glomar* response to seven of plaintiffs' 21 items. "The CIA relied on Exemptions 1 and 3 when it… asserted a *Glomar* response with respect to certain subparts of Plaintiffs' FOIA request." *Motion* at 14. "Where Plaintiffs requested information that would otherwise be classified (Plaintiffs Item Nos. 1, 5-6, 13, 16-17, and 21), the CIA re-asserted the *Glomar* response and refused to confirm or deny the existence of any responsive records." *Id*. at 10.[16]

Request 1 asks for records of CIA's efforts to locate POWs.[17] Request 13 asks for information related to a 1992 report from a KGB agent that "three Americans were still being held in the camps of Mordovia in July 1978." Request 16 seeks information on POWs held in named Russian prison camps. Request 21 requests information provided by Czechoslovakian General Jan Sejna regarding POWs interrogated by Czech and Soviet advisors, and thereafter transferred to China, Czechoslovakia, East Germany and the Soviet

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[16] Because these FOIA Requests contain language that the CIA should use as search terms, and because defendant yet to search it operational files repositories, plaintiffs cannot at this juncture critique the search terms that the CIA did use.

[17] FOIA Request, ECF No. 9-1:
Request 1: For the period of March 16, 1954, through 1961, all records of CIA's efforts in undertaking "clandestine and covert action to locate, identify, and recover those U.S. prisoners of war still in Communist custody."

Union. Requests 5 and 6 seek records regarding the 1952 memo that states, "Captain Moore survived and is now a prisoner of war," as well as records regarding his transport into the Soviet Union, and his interrogation there.[18] (Curiously, the CIA asserted *Glomar* regarding Harry Moore, but not any of the other 135 names of POW/MIA's that plaintiffs had submitted.[19])

The seventh request to which CIA asserted a *Glomar* response is Item 17. Preceding that item, plaintiffs' FOIA request states:

> By order issued on November 28, 1951, the *Combined Command for Reconnaissance Activity Korea,* or "CCRAK," was created. For your reference, two responsive CCRAK records are attached. *See also* CIA *Clandestine Services History* Historical Paper No. 52, "The Secret War in Korea," written in 1964, and declassified in 2007, at p. 78:
>
> > By the fall of 1951, CIA Headquarters recognized there were great opportunities if more experienced CIA officers were in Korea. Accordingly, three of the most competent senior clandestine services officers in the Agency were selected: one to be full-time CIA representative and Deputy of CCRAK, another as head of CCRAK's counterintelligence section and doubling as Chief of CIA's counterespionage staff, and the third as Chief of foreign intelligence activities.
>
> *FOIA Request*, ECF No. 9-1 at 7.

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[18] Request 5: All records upon which the following statement from February 27, 1952 Memo from Chief of Naval Personnel to Commanding General, Far East Air Force was based: "It is believed that there is a possibility that Captain Moore survived and is now a prisoner of war."
Request 6: All records regarding Captain Moore's incarceration and transportation from North Korea to the Soviet Union, his locations in the Soviet Union, and all evidence that he "may have been interrogated by Soviet officials."

[19] Request 15: All records relating to any of the POW/MIAs named in the attached list. (list appended to FOIA Request, ECF No. 9-1 at Bates 18-20.)
Cf. Blaine Decl. ECF No. 21-2 ¶ 33: "For Item 15: A search was conducted using the names provided by Plaintiffs, along with 'Prisoner of War;' 'Killed in Action,' 'Missing in Action,' 'Missing Person,' 'Defense Prisoner of War' and their variations. Eight records were located."

Having identified the CIA's role in the *Combined Command for Reconnaissance Activity Korea* ("CCRAK"), the Request asks, "[f]or the period beginning June of 1951, and continuing to the present time, please produce all POW records provided to, or received from, any office of any component of the Department of Defense, including but not limited to:

(a) CCRAK.
(b) *Air Force 6004 Air Intelligence Service Squadron* during the tenure of "Project American."
(c) *Missing in Action Office*, including those provided in response to the attached February 12, 1997 letter from U.S. House of Representative James Talent seeking "intelligence pertaining to American prisoners who were taken to China and the Soviet Union during the war," as well as "(a) the 389 American service members who into the 1980s were listed as unaccounted prisoners of war by the United Nations Command Military Armistice Commission (UNCMAC) and (b) all US Air Force F-86 pilots who remain unrepatriated."
(d) *Air Force Office of Special Investigations*, or AFOSI.
(e) *Naval Criminal Investigative Service*, or NCIS.
(f) *Army Criminal Investigation Command*, or CID.
(g) U.S. Army *Combined Command Reconnaissance Activities Far East*, or CCRAFE.

FOIA Request, ECF No. 9-1 at 2.

The CIA's justification for asserting *Glomar* appears in defendant's *Blaine Decl*. ECF No. 21-2 ¶¶ 21, 50-51:

> As discussed below, with regard to any records responsive to Plaintiffs' FOIA request that might reveal a classified or unacknowledged connection to the CIA, the Agency invoked the Glomar response, refusing to confirm or deny the existence or nonexistence of such records because the existence or nonexistence of such records is itself a currently and properly classified fact that could reveal clandestine CIA intelligence activities, sources, and methods.
>
> Here, the mere confirmation of whether certain responsive records do, or do not, exist would, in and of itself, reveal a classified fact: whether or not the CIA has an intelligence interest in or clandestine connection to a particular individual, group, subject matter, or activity.

> Terrorist organizations, foreign intelligence services, and other hostile groups search continually for information regarding the activities of the CIA and are able to gather information from a myriad of sources, analyze this information, and devise ways to defeat CIA activities from seemingly disparate pieces of information. Even where the subject of an intelligence interest or a group the CIA has engaged with in connection with intelligence operations is no longer of interest or engaged in operations, the CIA's adversaries continue to seek such information, as it may reveal to these adversaries the focus of the CIA's intelligence activities.

A *Glomar* response is appropriate if, upon a review of the agency's declaration, the assertion "appears logical or plausible." *Wolf v. CIA,* 473 F.3d 370, 374-75 (D.C. Cir. 2007).

Here, the response is illogical and implausible.

The existence or nonexistence of records responsive to plaintiffs' request is not properly classified for three independent reasons: (1) all of the requested records are more than 25 years old, (2) even if this information had initially been properly classified, it has been the subject of four mandatory declassification reviews, and (3) now, it is implausible that acknowledging the existence or nonexistence of the aged records could harm national security or foreign relations. Unless the CIA can show that it properly asserted the *Glomar* response, plaintiffs have a right to the records they requested or an explanation of why those records are exempt under FOIA. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6)(A)(i), (b); *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009); *Phillippi*, 546 F.2d at 1012.

CIA's activities are the subject of its *Clandestine Services History* Historical Paper No. 52, "The Secret War in Korea." The *Preliminary Statement*, *infra*, quotes from that work—declassified in 2007—of CIA Director Allen Dulles's response to General Twining's request "for clandestine and covert action to locate, identity, and recover" POWs. Dulles responded, "The Agency has had a continuing requirement for the development of information on the location of U.S. POWs."

As the CIA relates, its "intelligence interest" was mandated by law. "In fact," writes the CIA, "the National Defense Authorization Act for 1998 (Public Law 105-85), Section 934, states that: The Director of Central Intelligence in consultation with the Secretary of Defense shall provide intelligence analysis on matters concerning prisoners of war and missing persons… to all departments and agencies of the Federal Government involved in such matters." *Hendershot Aff*. Exhibit A at Bates 113.

Courts hold that the CIA's public acknowledgement of an "intelligence interest" will defeat a *Glomar* response.[20]

To rely on the *Glomar* response, the CIA must submit a declaration explaining "in as much detail as possible," that confirming or denying the existence or nonexistence of responsive records would itself reveal exempt information. *Wilner*, 592 F.3d at 68. Although the agency's detailed declaration is entitled to substantial weight, ultimately the court must review the agency's decision *de novo*. *Id*. FOIA's exemptions are narrowly construed, and any doubt as to their applicability must be resolved in favor of disclosure. *Id*. at 69.

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[20] *ACLU v. CIA*, 710 F.3d at 432 (S.D.N.Y. 2017) (finding that "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself" and concluding that such a program had been implicitly acknowledged); *ACLU v. DOD*, 322 F. Supp. 3d 464, 478 (S.D.N.Y. 2018) (rejecting use of *Glomar*—which sought to prevent revealing whether CIA had intelligence interest in matter or whether certain individuals had decision-making authority on matter—because White House press secretary made public statements that "clearly disclosed the CIA's intelligence interest in the matter, . . . explicitly acknowledged that the U.S. participated, . . . and that the Director of the [CIA] (explicitly referred to by his title) was in the room when the matter was decided").

Here, the CIA perfunctorily declared, "The existence or nonexistence of these records pertains to 'intelligence activities (including covert action), [or] intelligence sources or methods' and 'foreign relations or foreign activities of the United States, including confidential sources' within the meaning of sections 1.4(c) and 1.4(d) of the Executive Order." *Blaine Decl*. ECF No. 21-2 ¶ 48.

The *Blaine Decl*. is insufficient to justify withholding the information under Exemption 3 because it provides no explanation of why acknowledging the existence, or nonexistence, of records up to 68 years old regarding unrepatriated Korean War POWs would reveal a CIA source or method. Exemption 1 does not apply because the requested records, including their existence or nonexistence, are subject to automatic declassification, and because it is implausible that the existence or nonexistence of a half-century-old interest in POWs would undermine national security.

"Here," according to the CIA, "the mere confirmation of whether certain responsive records do, or do not, exist would, in and of itself, reveal a classified fact: whether or not the CIA has an intelligence interest in or clandestine connection to a particular individual, group, subject matter, or activity." *Blaine Decl*. ECF No. 21-2 ¶ 50. But disclosure will not "reveal" whether CIA *has* an intelligence interest, but rather, whether it *had* an intelligence interest a half century ago. And, of course, that "interest" is public knowledge, and even codified.

Old records are, as a category, less likely than contemporary records to pose a threat to national security. Defendant fails to make any distinctions based on the age of the records, except to note that the classifications are proper, "despite the passage of time:"

> Despite the passage of time, this information remains currently and properly classified because the release of this information could significantly impair

> the CIA's ability to carry out its core missions of gathering and analyzing foreign intelligence and counter intelligence and conducting intelligence operations, thereby damaging the national security.

Blaine Decl. ECF No. 21-2 ¶ 50.

"Such a conclusory statement completely fails to provide the kind of fact-specific justification that either (a) would permit [the plaintiff] to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective *de novo* review of the [agency's] redactions." *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999). Because the CIA has not shown that the existence or nonexistence of all such records necessarily falls within a FOIA exemption, the claim is insufficient to support the CIA's *Glomar* response in this case.

Acknowledging the existence or nonexistence of old records regarding POWs would say nothing about the CIA's surveillance capabilities today. Whether the CIA had the ability to monitor POWs during that era—before the Internet, cell phones, satellites, and other surveillance technologies—says nothing about the CIA's capabilities today. The CIA's Declaration provides no explanation to the contrary. If all or a part of a responsive record contains intelligence sources or methods, that information could be withheld under the FOIA. But simple acknowledgment of the existence or nonexistence of aged records on Korean War POWs could not reveal intelligence sources or methods, and, thus, the CIA's *Glomar* response is unjustified under the FOIA.

To be sure, automatic declassification is subject to certain exceptions. The only two possibly relevant exceptions in this case would be that an agency head may exempt from automatic declassification information that if released "should be expected to

- Reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security

> service of a foreign government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development; or
>
> - Reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States;
>
> E.O. 13526 § 3.3(1), (6).

Here, disclosure of the existence or nonexistence of the records sought could not plausibly harm national security, or U.S. foreign relations. The burden is on the CIA to demonstrate that the aged records at issue fit within one of the exceptions to mandatory declassification. *See Hall v. CIA*, 668 F. Supp. 2d 172, 188-89 (D.D.C. 2009).

The CIA has not, and cannot, carry its burden.

VI. Records Withheld in Full

The CIA withheld four documents in their entirety: (1) a classified version of 2000 213-page record that the CIA produced in this case,[21] (referred to below as the *Review of the Charges Document*), (2) a three-page 1952 *Information Report* discussing the location of

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[21] *See Vaughn Index* ECF. No. 22-1 at 26-27:

> This document consists of the classified version of the joint Department of Defense and CIA report on POW/MIA issues (unclassified version released in full as C00500205). Exemptions (b)(l) and (b)(3) (National Security Act) applies to certain material that is classified under 1.4(c) of E.O. 13526 and reflects intelligence activities or intelligence sources and methods (intelligence activities). This document is withheld in full because CIA determined that the ability to see where the classified, redacted sections were located in the report is sensitive information. This document is classified as SECRET, and as such, disclosure of this information could be reasonably expected to result in damage to national security.

(Unclassified version *Hendershot Aff*. Exhibit A at Bates 85-262.)

transit camps for POWs in the USSR,[22] (3) a 1973 three-page memorandum discussing a Congressperson's inquiry into American POWs in the USSR;[23] and (4) a 1987 three-page record discussing the potential return of the remains of two missing persons.[24]

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[22] *Id.* at 25-26:

> This document consists of information report discussing the location of transit camps for POWs in the USSR. Exemptions (b)(l) and (b)(3) (National Security Act) applies to certain material that is classified under 1.4(c) of E.O. 13526 and reflects intelligence activities or intelligence sources and methods (intelligence activities). The CIA conducted a line-by-line review of this document to determine whether meaningful, reasonably segregable, non-exempt portions of the document could be released. This document is withheld in full because there is no meaningful non-exempt information that can reasonably be segregated from any exempt information. This document is classified as CONFIDENTIAL, and as such, disclosure of this information could be reasonably expected to result in damage to national security.

[23] *Id.* at 22-23:

> This document consists of a memorandum discussing a Congressperson's inquiry into American POWs in the USSR. Exemptions (b)(l) and (b)(3} (National Security Act) applies to certain material that is classified under 1.4(c) of E.O. 13526 and reflects intelligence activities or intelligence sources and methods (intelligence activities). Exemption (b)(6) was invoked to protect identifying information of CIA personnel and individuals (names, official titles, location, telephone number, and email addresses). The CIA conducted a line-by-line review of this document to determine whether meaningful, reasonably segregable, non-exempt portions of the document could be released. This document is withheld in full because there is no meaningful non-exempt information that can reasonably be segregated from any exempt information. This document is classified as SECRET, and as such, disclosure of this information could be reasonably expected to result in damage to national security.

[24] *Id.* at 23-24:

> This document consists of a cable discussing the potential return of the remains of two missing persons to the US. Exemptions (b)(l) and (b)(3) (National Security Act) applies to certain material that is classified under l.4{c) of E.O. 13526 and reflects intelligence activities or intelligence sources and methods (intelligence activities). The CIA conducted a line-by-line review of this document to determine whether meaningful, reasonably

Defendant's stated justification:

> In four instances where no segregable, non-exempt portions of the document could be released without potentially compromising classified information or other information protected under the FOIA, the documents were withheld from Plaintiffs in full. In this case, the withheld information challenged by Plaintiffs is protected by Exemptions (b) (1), (b) (3), and (b) (6) because it is classified information concerning intelligence sources, methods and activities, and also contains personally identifiable information related to CIA personnel.

Blaine Decl. ECF No. 21-2 ¶ 65.

"Review of the Charges" Document. The classified version of the joint CIA/DOD Report, *A Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A CRITICAL ASSESSMENT OF THE ESTIMATE,* is withheld in full. The CIA released the unclassified version in this case, and it appears in the *Hendershot Aff*., Exhibit A at Bates 85-259. While the Report is devoted to the issue of the number of POWs remaining in communist hands after the Vietnam War's Operation Homecoming in 1973, it does address the transfer of U.S. POWs to Russia—a focus of plaintiffs' research. Moreover, the "Review of the Charges Document" is instructive on the CIA's approach to intelligence regarding abandoned POWs.

This 124-page report, written in February of 2000, was a retort to charges made by Senator Bob Smith.

The genesis of the controversy was the CIA's April 1998, *National Intelligence Estimate on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA*

> segregable, non-exempt portions of the document could be released. This document is withheld in full because there is no meaningful non-exempt information that can reasonably be segregated from any exempt information. This document is classified as SECRET, and as such, disclosure of this information could be reasonably expected to result in damage to national security.

Issue ("NIE"). The NIE had disparaged the reliability of the so-called "1205 Document," as well as the "735 Document," both of which had been recovered from the records of the Soviet GRU (military intelligence service). Those records reflected Vietnamese assertions that it held 1,205 U.S. POWs just months before Operation Homecoming, including 735 airmen. The Vietnamese represented to the U.S. that it had 368 airmen, and released a total of 591 POWs during Operation Homecoming, so around 600 had been held back, according to this record. In February of 1998, the CIA distributed the NIE (to those with clearance as it was classified as "Secret" and released to the public in July of 2000, redacted).

Eight months later, in November of 1998, Senator Bob Smith issued a detailed, 60-page, *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* ("*Critical Assessment*"), together with 140 pages of attachments. The *Critical Assessment* opines that the NIE's judgment cannot be accepted because it is "replete with inaccurate and misleading statements, and lacks… analytical foundation," and demands that it be retracted.[25] The CIA had released Senator Smith's *Critical Assessment* in 2016, in *Hall v. CIA*.

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[25] The Senator qualifies to opine under Federal Rule of Evidence 702, *Testimony by Expert Witnesses*. The purpose of the Senate Select Committee on POW/MIA Affairs (1989-1993) was to investigate the fate of United States service personnel listed as missing in action during the Vietnam War, and the Korean War. Senator Smith wrote, and introduced, the Senate Resolution establishing that Committee, in an attempt to get the documents and the truth released to the public. He served as the Committee's Vice Chairman. In his opening statement at the *Hearing on Cold War, Korea, WWII POWs,* Senator Smith said of his 54-page Report, *Chronology of Policy and Intelligence Matters Concerning Unaccounted for U.S. Military Personnel at the end of the Korean Conflict and During the Cold War*:

> [I]t is the most comprehensive compilation of US government policy and intelligence information concerning what we have known about the fate of

From the *Critical Assessment* Executive Summary:

> *The "1205" and "735" Documents*
> With respect to the so-called "735" and "1205" documents, the NIE judges that" many of the details of the documents are implausible or inconsistent with reliable evidence" and therefore does not assess the likely range of numbers of American POWs in the spring of 1973. The NIE further judges that "[n]either document provides a factual foundation upon which to judge Vietnamese performance on the POW/MIA question." However, I conclude, for the reasons noted in this critical assessment, that the NIE's judgment on the 1205/735 documents cannot be accepted with confidence because it is replete with inaccurate and misleading statements, and lacks a reasonably thorough and objective analytical foundation on which to base its judgment. I further conclude, based on a review of relevant U.S. data, that many of the statements contained in both the 1205/735 documents and the so-called 185 report discussed herein are indeed supported or plausible, and have very serious implications which should warrant an *urgent* review of U.S. policy toward the Government of the Socialist Republic of Vietnam (SRV).

> many of our missing men from the Korean conflict and what we did about it. It is a document that shows in explicit detail with a lot of research that the government and North Korea did not return a large number of American servicemen at the end of the war, and that some of the men left behind were sent to Communist China into the Soviet Union.

Smith Aff. ¶¶ 9-10. (*Committee Chronology id.* ¶¶ 15-281.)

Plaintiffs' other expert, Mark Sauter, is also competent to provide expert opinion on the matter. *See Sauter Aff.* ¶¶ 1-2:

> [A] uthor, and investigator, and recognized as an expert on POW/MIA issues… cited by… Associated Press, The New York Times, The Wall Street Journal, Los Angeles Times, ABC News, the Washington Post… and in two U.S. Senate investigations. For more than 25 years, I have researched the issue…. co-authored four books, including *American Trophies: How American POWs Were Surrendered to North Korea, China, and Russia by Washington's "Cynical Attitude"...* [In] 1991 the U.S. Senate Committee on Foreign Relations Republican Staff released its 105-page Report, *An Examination of U. S. Policy Toward POW/MIAs*… In his cover letter accompanying the report, Senator Helms… [wrote], "*This report has required many hundreds of hours of work … I would be especially remiss were not to mention Dr. Harvey* Andrew *Thomas Ashworth, John M.G. Brown, and Mark Sauter of CBS affiliate, KIRO, Seattle, Washington.*

> *The Politicization of Intelligence*
> Congress and the leaders of the U.S. Intelligence Community (IC) need to examine what role the White House, its National Security Council, and certain US policymakers responsible for advancing the Administration's normalization agenda with Vietnam may have played in influencing or otherwise affecting the judgments of the IC as reflected in the NIE. The evidence, which appears to warrant such an examination, is detailed in this critical assessment under Part IV.

The plaintiffs in *Hall v. CIA* observed that the *Critical Assessment* "is the most illuminating record ever released on the issue of the number of POWs remaining in communist hands" following the end of the Vietnam War:

> One of the more telling belated disclosures was the CIA's only production in 2016, the Critical Assessment of 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue. (Note 2 infra, records posted http://johnhclarkelaw.com/pdf/Hall-CIA/CIA-Production-2016-209-pages.pdf.) It is the most illuminating record ever released on the issue of the number of POWs remaining in communist hands at war's end. It unequivocally establishes the reliability of the so-called "1205 Document," discovered in Soviet archives. It is a transcript of a Vietnamese Politburo meeting just months before War's end, recorded by the Soviets, secretly. The Vietnamese reported that the number of communist-held American POWs in Southeast Asia was 1,205. **Defendant disclosed this 1998 record in 2016, having declined to do so upon its Decennial review in 2005, and in 2015**.

Plaintiffs' Motion to Reconsider, ECF No. 364 at 6. (Emphasis supplied.)

The CIA released in this case the unclassified version of its *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A* CRITICAL *ASSESSMENT OF THE* ESTIMATE, which appears in the Hendershot *Aff*. Exhibit A at Bates 85-259. The classified version of this joint CIA/DOD Report, *A Review if the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate,* is withheld in full.

In plaintiffs' view, the unclassified version of the joint CIA/DOD *Review of the Charges* Report provides a plethora of evidence of CIA bad faith arguments seeking to undermine the veracity of the 1205 Document. So, plaintiffs believe that disclosure of the classified version would serve "the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Other three Records Withheld in Full. So too with the other three records withheld in their entirety, particularly the 1952 *Information Report on location of transit camps for POWs in the USSR*. These "withheld in full" documents are the subject of *Plaintiffs' Motion for In Camera Inspection*, filed simultaneously with this pleading.

CONCLUSION

There is no genuine issue of material fact regarding defendant's failures to conduct, and describe, meaningful searches. The CIA has not, and cannot, meet its burden to show the applicability of the exemptions that it asserts, so it must disclose all responsive records, unredacted.

WHEREFORE, Plaintiffs Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter, pray that the Court enter Summary Judgment in their favor.

DATE: January 17, 2022.

Respectfully submitted,

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