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' MEMORANDUM IN REPLY TO DEFENDANT'S
OPPOSITION TO CROSS-MOTION FOR ENTRY OF SUMMARY JUDGMENT

Plaintiffs Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter, submit this memorandum in response to *Reply in Support of Defendant's Motion for Summary Judgment and Omnibus Opposition to Plaintiffs' Cross-motion for Summary Judgment and Motion for In Camera Inspection*, ECF No. 32 ("*Def. Reply*.").

1. Plaintiffs did not Waive their right to Challenge Defendant's Search

The CIA's theory is that plaintiffs waived their rights to challenge the adequacy of the search. In support of this position, defendant:

(1) Represents that counsel stated in any telephone conversation "that the Plaintiffs were only challenging the redactions and withholdings." (*Valdez Decl*. ECF No. 32-2 ¶ 8); and

(2) Cites the CIA's final Status Report, which reflects that plaintiffs are challenging defendant's redactions. *CIA Status Report*, ECF No. 20 ¶ 5.

But plaintiffs made no such statement, and the referenced *CIA Status Report* does not reflect any waiver.

The *CIA Status Report* apprised the Court that defendant had completed its search, review, and productions, that briefing would be necessary, and proposed a schedule:

"Plaintiffs has [sic] informed Defendant that Plaintiffs are challenging the redactions and withholdings made by Defendant… [a]ccordingly, the parties… request the following dates for the filing of dispositive motions…" ECF No. 20 ¶ 5. Contrary to defendant's representation, "only" does not appear anywhere in the *CIA Status Report*.[1] Nor does it include the term "waiver," or "narrow," or "withdraw," as it surely would have had any such waiver been communicated.

The cases that defendant cites regard issues that had unequivocally been waived. Moreover, all these cases rely on Status Reports that were submitted jointly, whereas here, the report is made only by CIA. (Plaintiffs had asked defendant to make the Status Reports joint, but defendant declined to do so.) *See Gilman v. Dep't of Homeland Sec.*, 32 F. Supp. 3d 1, 22 (D.D.C. 2014) ("Court entered a Scheduling Order effectuating this agreement based on the proposed order submitted by the parties with their joint status report… plain meaning of the joint status report makes clear that the plaintiff narrowed her FOIA request…"); *People for America Way v. U.S. Dept. of Justice*, 451 F. Supp. 2d 6, 12 (D.D.C. 2006) ("Significantly, the government was a signatory to several Joint Status Reports during the course of this litigation, in which the parties represented—unequivocally—that the FOIA request had been narrowed…"); *DeFraia v. CIA*, 311 F. Supp. 3d 42, 48 (D.D.C. 2018) (plaintiff "narrowed the scope of his FOIA request"); *Genereux v. Raytheon Co.*, 754 F.3d 51, 59 (1st Cir. 2014) (Declaration properly struck where it was "filed until some

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[1] *Clarke Aff.* ¶ 1:

> Mr. Valdez represents that the October 15, 2021 *CIA Status Report*, states "that Plaintiffs were only challenging the redactions and withholdings." This statement is false. *See* ECF No. 20 ¶ 8.

thirteen months after the deadline for expert witness submissions agreed to by the parties and confirmed in the district court's scheduling order.")

Nor does the CIA's position that plaintiffs are only challenging the redactions and withholdings address the other issues raised by plaintiffs.

At least by July of 2020 defendant was aware that plaintiffs intended to challenge any *Glomar* assertions. *Plaintiffs' Opposition to Defendant's Motion to Vacate Court's Scheduling Order*, ECF No. 9, urges defendant not to assert *Glomar*. Plaintiffs sought "the CIA's cooperation in not litigating the issue at all." *Id*. ¶ 12.

> Plaintiffs hope that the CIA would review the merits of asserting *Glomar* in response to their request for information on Harry Moore, and make a discretionary release of this information. A *Glomar* response would seem frivolous, would result in needless delay, and may result in plaintiffs seeking leave to bifurcate the matter to adjudicate the issue before the CIA completes its search. Plaintiff Lois Moore is 92-years old, and plaintiff Robert Moore is 94.[2]

Id. ¶ 25.

In defendant's view, its *Glomar* responses absolves the CIA of any obligation to conduct any search for many of the records sought. Under CIA's theory, plaintiffs should be foreclosed from raising all search issues, including challenging the *Glomar* responses, contrary to plaintiffs' prior pleadings. (After plaintiffs filed their *Opposition to Motion to*

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[2] *Cf. Valdez Decl*., ECF No. 32-2 ¶ 12:

> At no time prior to filing its Opposition/Cross-Motion for Summary Judgment did Plaintiffs ever notify Defendant that Plaintiffs had issues with the search.

Vacate Scheduling Order, defense counsel told plaintiffs' counsel that the CIA would not be asserting *Glomar*.[3] Of course, this representation did not operate as a waiver.)

Moreover, plaintiffs' dispositive motion takes issue with a number of aspects of the matter in addition to the issues of the search and *Glomar*, such as (1) CIA's failures to adhere to the mandates of Executive Order 123526, (2) its violations of the McCaine Act, (3) its failure to declassify upon Decennial Reviews, (4) its failure to conduct any search for six items claiming that these requests had not been "reasonably described," and (5) not re-reviewing any of the 23 CIA records submitted with plaintiffs' dispositive motion. These issues, like the search issue, do not appear in defendant's *CIA Status Report*, and they too were not waived.

Additionally, defendant's declaration in support of *Defendant's Motion for Summary Judgment* (ECF No. 21) devotes eighteen paragraphs to its search. *See 1st Blaine Decl*. ECF No. 21-2 ¶¶ 19-37.[4]

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[3] *Cf. Def. Opp*. at 10:

> The CIA has never provided any reason to doubt its consistent position that it could not confirm or deny whether any records exist that would reveal a classified connection to the agency.

[4] *See, e.g., 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.

The CIA's response to six of plaintiffs' items was that the information had not been "reasonably described," and so it did not conduct any search. *See Pl. Mot*. at 3-7. Defendant's waiver argument would seem to extend to even these requests. So too with plaintiff's complaints that the CIA failed to search its operational file repositories (*id*. at 7), its failure to re-review responsive, previously released, redacted, records (*id*. at 9), its failure to adequately describe its search (*id*. at 10), and its failure to search records housed at the National Archives (*id*. at 12-15).

The CIA relies on its waiver theory in its *Statement of Material Facts as to Which There Exists a Genuine Issue*, ECF No. 32-2.[5] Defendant declined to respond to most of plaintiff's 83 statement of material fact by asserting that the statement "makes allegations regarding the search for records that are immaterial to the issue of summary judgment in this FOIA civil action." The CIA must respond to plaintiffs' statements, substantively, or the statements should be deemed admitted.

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[5] *Plaintiff's Statement of Material Facts as to which there is no Genuine Issue*, ECF No. 25-9 at 1, *Contents*:

The authority that the CIA cites does not help it. The record in this case does not support, and is contrary to, defendant's waiver claim. Defendant asked plaintiffs whether they were challenging the redactions, and plaintiffs answered that they were, and asked that the matter timely proceed to briefing. From this exchange, defendant claims that "Plaintiffs affirmatively limited the scope of the summary judgment proceedings to exclude the search for records." *Def. Reply* at 6. Here, the CIA asserts that plaintiffs waived their objections to the search without even asking plaintiffs whether they agreed to waive the issue.[6]

2. Exemptions and *Glomar*

Under its *Exemptions 1 and 3 and Glomar* section of *Def. Opp*., at 5-10, the CIA argues that the information requested is not as specific as the information previously released, or has not been officially disclosed. But plaintiff did not argue previous, official, disclosure. Rather, plaintiffs noted that "Courts hold that the CIA's public acknowledgement of an 'intelligence interest' will defeat a *Glomar* response." *Plaintiff's Cross Motion for Summary Judgment, and Opposition to Defendant's Motion for Summary Judgment* ("*Pl. Mot.*"), note 20 at 34.

Nor does the CIA explain why it asserts *Glomar* for records regarding Harry Moore, but not for any of the other 135 POW/MIA's whose names that plaintiffs submitted with their FOIA Request. *See Pl. Mot*. at 31.

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[6] *See Clarke Aff*. ¶ 2:

> Mr. Valdez represents that, last October, the undersigned told him that plaintiffs "were only challenging the redactions and withholdings." *Valdez Decl*. ECF No. 32-2 ¶ 7. This statement is false.

The CIA admits that the records at issue are subject to automatic declassification under E.O. 13526, but perfunctorily declares that the records are exempt as disclosure would reveal the identity of a confidential or human source or intelligence relationship, or impair an intelligence method, or reveal information that would cause serious harm to ongoing diplomatic activities. *Def. Reply* at 7.

Defendant cites the *Blaine Decl*., ECF No. 21-2, claiming that it "specifically addresses these exemptions and further demonstrates how the documents and information sought by Plaintiffs, including any that may or may not exist pursuant to the *Glomar* response, meet the requirements of the exemptions." *Id*. But the *Blaine Decl*. simply sets forth the standard under E.O. 13526, with no analysis whatsoever of how the records at issue could possibly be exempt. The burden to prove the applicability of the E.O.'s exemptions is on the CIA—a burden it cannot meet.

Regarding the issue of the sufficiency of the CIA's Decennial Reviews, defendant cites *Smith v. CIA*, 246 F. Supp. 3d 117, 125-26 (D.D.C. 2017) for the proposition that "the CIA is not required to demonstrate that it conducted an appropriate decennial review of the specific files that Plaintiff seeks, because the CIA is not required to search its operational files for records responsive to Plaintiff's request." But plaintiff's cited authority demonstrates that the records are not properly considered "operational files." The CIA wholly ignores this authority, including *Hall et al. v. CIA*, 268 F. Supp. 3d at 161, which held that the CIA had "fail[ed] to demonstrate how such dated [Vietnam War POW] records can reasonably be considered operational under the statute." *See Pl. Mot.* at 7-8.

Defendant also declares that it properly considered "historical value or other public interest in the subject matter." *Def. Reply* at 8. The record demonstrates otherwise, and the

CIA fails to address any of the examples of unwarranted nondisclosures that plaintiffs provided in their dispositive motion.

The CIA seeks to justify a number of redactions and withholdings on privacy grounds, arguing that disclosure and would constitute a clearly unwarranted invasion of personal privacy under 5 U.S.C. § 552(b)(6), and averring that "[e]xposing CIA or U.S. Government affiliation exposes persons and their families to unwanted harassment [and] even possible retaliation or death." *Def. Reply* at 11. Citing the Supplemental Declaration of Vanna Blaine, ECF No. 32-4 ("*Supp. Blaine Decl*."), the CIA avers that it "has been unable to verify if any of the persons redacted from the records are deceased, and the mere fact that the document may have been created 50 years ago does not create or support such a presumption." *Id.* According to the *Supp. Blaine Decl.* ECF No. 32-4 ¶ 6:

> The responsive records did not contain sufficient detail to determine whether the named individuals are living or deceased from face of the records. Additionally, the records do not provide sufficient additional identifying information such that the Agency could ascertain, with any degree of certainty, an individual's status. Internet searches of individual names, without more, are also not instructive on this point. Moreover, the dates of the records, on their own-which date from 1952 onwards-do not definitively indicate that persons mentioned therein would be deceased. Moreover, the dates of the records, on their own-which date from 1952 onwards-do not definitively indicate that persons mentioned therein would be deceased.

The CIA could have run a Lexis-Nexus or similar search using the names, but did not. Defendant cannot know that such an inquiry would not be "instructive," or "definitively indicate" whether the individual is deceased, without having conducted such a search.

Additionally, to the extent that the CIA's information includes the individual's approximate age when the record was generated, it could disclose a number of these names with no possibility that the individuals are still living, well into their hundreds.

3. *In Camera* Inspection of Records Withheld in Full

Plaintiffs seek *in camera* inspection of the four records that the CIA withheld in their entirety: (1) a classified version of 2000 213-page record that the CIA produced in this case (2) a three-page 1952 *Information Report* discussing the location of transit camps for POWs in the USSR (3) a 1973 three-page memorandum discussing a Congressperson's inquiry into American POWs in the USSR; and (4) a 1987 three-page record discussing the potential return of the remains of two missing persons. *Plaintiffs' Motion for In Camera Inspection*, ECF No. 25. Plaintiffs posits that, under *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980), five of the six factors to be considered on the issue of inspection *in camera* are present in this case.

In response, the CIA simply declares that it "adequately reviewed the documents for segregability and, based on its review, has properly withheld them in full," and that its declaration "provided sufficiently detailed information establishing that the CIA properly classified, and properly retained the classification." *Def. Reply* at 13-14.

Here too defendant's perfunctory response is insufficient to defeat the relief sought.

WHEREFORE, Plaintiffs Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter respectfully pray that the Court grant their Motion for Summary Judgment, and order the CIA to submit the four records for the Court's review *in camera*.

Date: April 12, 2022.

Respectfully submitted,

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