

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                              |   |                                |
|------------------------------|---|--------------------------------|
| ROBERT MOORE, <i>et al.</i>  | ) |                                |
|                              | ) |                                |
| Plaintiffs,                  | ) |                                |
|                              | ) |                                |
| v.                           | ) |                                |
|                              | ) | Civil Action No. 20-1027 (RCL) |
| CENTRAL INTELLIGENCE AGENCY, | ) |                                |
|                              | ) |                                |
| Defendant.                   | ) |                                |
| _____                        | ) |                                |

PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

COME NOW Plaintiffs, by counsel, under Rule 15(a) of the Federal Rules of Civil Procedure and Local Civil Rule 7, and respectfully move this Court for leave to amend their Complaint. The proposed pleading, as amended, is submitted with this motion. Defendant Central Intelligence Agency ("CIA") opposes the relief sought.

Plaintiffs seek to (1) allege improper classification and withholding under 50 U.S.C. § 3141, (2) narrow the FOIA request for information on Harry Moore, and (3) add as plaintiff Michael Driggs, who is among the individual FOIA Requesters in the November 25, 2019 FOIA Request upon which this action is founded.

MEMORANDUM OF POINTS AND AUTHORITIES

Counts III and IV  
Improper Withholding of Operational Files,  
Absence of Consideration of Historical Value and Public Interest

1. Plaintiffs' complaint seeks disclosure of records that are retained in operational file repositories. All of these records have been reviewed, for disclosure, during the CIA's Decennial Reviews in 1995, 2005, and 2015.

2. The Court's July 29, 2022 Memorandum Opinion ("*Mem. Op.*") held that it would not order the CIA to search its operational files because plaintiffs had not fulfilled certain requirements:

In their discussion of the CIA's search, plaintiffs repeatedly state that the CIA must search its operational files. PIs.' Mot. 7. As this Court has recently explained, the CIA's "[o]perational files are typically exempt from search and disclosure, but this Court [can] order [] their search under an exception." *Hall v. Cent. Intel. Agency*, No. 04-cv-814, 2022 WL 2528102, at \*1 (D.D.C. July 7, 2022) (citing 50 U.S.C. § 3141(a)). That exception is statutorily defined and has certain requirements. *See* 50 U.S.C. § 3141(f). Plaintiffs do not raise that exception here. Accordingly, the Court will not order the CIA to search its operational files at this time.

*Mem. Op.* ECF No. 40 at 6.

3. Plaintiffs' proposed Amended Complaint ("*Am. Compl.*") states:

Under 50 U.S.C. § 3141 (f)(3), "when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence."

Attached hereto as Exhibit A is the Affidavit former CIA official, Kevin Shipp, whose expertise includes classification authority.

*Am. Compl.* ¶¶ 19-20.

4. Plaintiffs aver that CIA has "improperly withheld because of improper placement solely in exempted operational files," and that the "requested records were improperly withheld because of the CIA's improper exemption of operational files." *Id.* ¶¶ 21, 23.

5. This relief is in the interest of justice, and it raises no new issues.

Narrow Request regarding Harry Moore

6. Requests 4 through 6 seek records on Harry Moore:

Request 4

All records regarding the June 1, 1951 shoot down and capture over North Korea of the American F-51 piloted by U.S. Air Force Captain Harry Cecil Moore, born February 11, 1924, in Elm Grove, West Virginia, service number AO 711850.

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."

7. The Court held that the CIA's *Glomar* response had been meritorious because plaintiffs had requested specific information regarding Harry Moore:

It is true that the CIA asserted a *Glomar* response to plaintiffs' requests 5 and 6—which involve Captain Moore—but did search and release documents responsive to plaintiffs' request 15, which involved 135 other names of POWs. Blaine Decl. ¶¶ 33, 39. But plaintiffs' requests 5 and 6 are considerably more specific and ask for records upon which specific statements and documents were based. Pls.' Mot. 31 n. 18. Plaintiffs' request 15 is far broader and asks merely for documents relating to any of the 135 names on the list. Pls.' Mot. n. 19.

*Mem. Op.* ECF 40 n. 2 at 14-15.

8. By email dated August 25, 2022, plaintiffs narrowed requests 4 through 6, to strike all references to records upon which specific statements and documents were based, as well as references to his shoot-down and transport to the Soviet Union. Plaintiffs wrote:

The plaintiffs narrow FOIA Requests 4, 5, and 6, which seek information on Harry Moore, to strike all references to records upon which specific statements and documents were based, as well as references to his shoot-down and transport to the Soviet Union. This request is now akin to Request 15, which seeks "All records relating to any of the POW/MIAs named in the attached list."

The Request, as narrowed, should read "All records relating to POW/MIA Harry Cecil Moore."

9. This Circuit held that it was error to decline to accept a narrowed request during the course of the litigation. In *Trans-Pacific Policing v. U.S. Customs*, 177 F.3d 1022, 1023 (D.C. Cir. 1999), the FOIA plaintiffs sought to narrow their request before the District Court, which would have triggered the agency's obligation to produce records. The Court of Appeals reversed and remanded:

Both sides agree that appellants could and would simply file a new lawsuit if the case were dismissed. And counsel for Customs concedes that there is really nothing of substance to be gained by requiring appellants to file a new FOIA request at the administrative level; it is also clear that a new lawsuit will be costly in terms of additional time, expense, and wasted judicial resources. In these circumstances, we believe that a remand is warranted.

10. Simultaneously with the moving of the instant relief, plaintiffs have made a second FOIA request to CIA, seeking "All records relating to any of the POW/MIAs named in the attached list," which includes "Harry Cecil Moore." Here too the denial of the relief sought "will be costly in terms of additional time, expense, and wasted judicial resources." *Id.*

11. This relief would avoid wasting judicial resources, and raises no new issues.

Plaintiff Michael Driggs

12. Michael Driggs is among the individual FOIA Requesters in the November 25, 2019 FOIA Request, upon which this action is founded. ECF No. 9-1 at 1.

13. Adding Mr. Driggs as the fifth plaintiff would also raise no new issues.

