UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT MOORE, *et al.*, Plaintiffs, v. UNITED STATES CENTRAL INTELLIGENCE AGENCY Defendant.	Civil Action No. 20cv1027 (RCL)

OPPOSITION TO MOTION TO AMEND COMPLAINT

In this Freedom of Information Act ("FOIA") matter, Plaintiffs seek 21 types of records relating to American Prisoners of War ("POWs") from the Korean Conflict, including U.S. Air Force Captain Harry Cecil Moore. *See* Complaint (ECF No. 1). In the course of this matter, CIA has produced twenty-nine documents in part and six documents in full to Plaintiffs. *See* Declaration of Vanna Blaine ("Blaine Decl.") (ECF No. 21-2) at ¶¶ 9-17, Affidavit of Mark Sauter (ECF No. 25-2) and Affidavit of Robert Moore (ECF No. 25-3). The CIA confirmed that it could neither confirm nor deny the existence or nonexistence of records responsive to several of the Plaintiffs' requests and *Glomar'd* the requests.[1] The CIA properly refrained from processing and producing documents located in its Operational Files, which are exempt from search in response to a FOIA request under Exemption 1 and 3. Blaine Decl. at ¶ 20. *See* 50 U.S.C. § 3141(a). Now, after over two years of litigation and a round of fully-briefed dispositive motions (and a Court decision that resolved most issues in this matter, including the very issue

[1] CIA issued a *Glomar* for the following of Plaintiffs' requests: 1, 5-6, 13, 16-17, and 21. Blaine Decl. at ¶ 18.

raised by Plaintiffs in their amendment), Plaintiffs are now attempting to change the initial FOIA request submitted to the CIA and their tactics for obtaining classified material. Because Plaintiffs cannot explain why they waited over two years to raise the claim that was always available to them, and because Plaintiffs' amendments and proposed Requests for Admission would necessitate considerable time to resolve a case that was very near completion, the Court should deny the motion to amend due to Plaintiffs' undue delay.

I. PROCEDURAL BACKGROUND

On April 28, 2020, Plaintiffs commenced this litigation, alleging that the CIA failed to provide all responsive documents. ECF No. 1. CIA filed its Answer on June 3, 2020. ECF No. 6. For the next year-and-a-half, CIA processed and produced documents on a rolling basis, and completed its review and production of responsive, non-exempt records on October 1, 2021. ECF No. 20.

On December 12, 2021, Defendant filed its Motion for Summary Judgment, ECF No. 21. In its Motion, Defendant asserted a *Glomar* defense with respect to any records that might reveal a classified or unacknowledged connection to the Agency, indicating that the CIA could neither confirm nor deny the existence or nonexistence of such records, as the mere fact of their existence or nonexistence of records was properly classified and statutorily protected from disclosure under Executive Orders 13526 and 12333, the National Security Act of 1947 (the "National Security Act") and the Central Intelligence Act of 1949 (the "CIA Act"), and accordingly is exempt under FOIA Exemptions (b)(1) and (b)(3).

Plaintiffs filed their Opposition and Cross-Motion for Summary Judgment on January 17, 2022, ECF Nos. 25 and 27, along with a Motion for Order for In Camera Inspection. ECF No.

26. Defendant filed its Reply and Omnibus Opposition to Plaintiffs' Motions on February 23, 2022, ECF Nos. 31-33, and Plaintiffs filed their Cross-Reply on April 12, 2022. ECF No. 38.

On July 28, 2022, the Court issued an order denying Plaintiffs' Cross-Motion for Summary Judgment and granting in-part and denying in-part CIA's Motion for Summary Judgment. ECF Nos. 40 (Memorandum Opinion) and 41 (Order). In its Memorandum Opinion, the Court denied the Defendant's Motion with respect to three issues – the scope of search and CIA's *Glomar* responses to Plaintiffs' Request Nos. 1 and 17. ECF No. 40. The Court did not order the production of any document, but rather ordered Defendants to provide a response identifying potential responsive records to Plaintiffs' request 1, and to supplement the record regarding the adequacy of the search for responsive records and its *Glomar* response to Plaintiffs' request no. 17. *Id.* at 24. With respect to the issue of CIA's classification of records, the Court noted that Plaintiffs failed to cite to or raise a statute allowing a challenge to the classification of records, and therefore the Court could not order the CIA to search its classified "operational" files. *Id*. at 6. The Court further ordered the Parties to propose a timeline for filing new motions for summary judgment on the remaining three issues. ECF No. 41.

On August 25, 2022, over two years after the initial filing of the Complaint, Plaintiffs filed a Motion to File Amended Complaint, seeking to add an additional Plaintiff and to add an additional count alleging that the CIA improperly classified and withheld records under 50 U.S.C. § 3141. ECF No. 42. Plaintiffs also seek to amend their FOIA request to the CIA, changing the request for all U.S. prisoners of war to records regarding Captain Moore. *Id.*

Along with the Motion to Amend, Plaintiffs attached a First Set of Request for Admissions to Defendant, setting out over 100 requests for admission. ECF No. 42-3. Because most of the requests submitted by Plaintiffs are unrelated to the issue of whether the CIA

improperly withheld requested records because of a failure to comply with any provision of the National Security Act of 1947, s*ee id.*, Defendant intends to move to strike the requests as irrelevant and outside the scope of Fed. R. Civ. P. 26(1) and 36.

Defendant opposes the Motion to File an Amended Complaint, as well as Plaintiffs' Request for Admissions at such a late stage in the proceedings. Indeed, Plaintiffs and their counsel have substantial experience in matters such as the action before this Court and are well-aware of the procedures for challenging a classification decision. Nevertheless, Plaintiffs waited until (1) the CIA had spent considerable time searching and preparing its responses to Plaintiffs' request; (2) the Parties thoroughly briefed the matter, including all opposition and reply memoranda; (3) the Court issued an initial decision on the matter of summary judgment; and (4) the matter was near completion, before seeking to amend the complaint and serve Requests for Admission. These moves surely would add months to the resolution of this matter.

II. ARGUMENT

Once a party has responded to the initial complaint, Rule 15 of the Federal Rules of Civil Procedure allows a party to amend its complaint "**only** with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2) (emphasis added). While a court has discretion as to whether to allow or deny the amendment, it should generally take into account the actions of the party seeking the amendment and any resulting prejudice. *Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996). In certain circumstances, amendments should be denied. If the facts surrounding the filing of an amendment demonstrates "apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant…" then such an amendment would cause, "undue prejudice to the opposing party by virtue of allowance of the amendment…." *Id*. (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962). Additionally,

amendments should be denied as "futile" if the new cause of action is deficient or would not survive a motion to dismiss. *Id.* *See also American Center for Law and Justice v. Dep't of State*, 254 F. Supp. 3d 221, 224 (D.D.C. 2017) ("In other words, if the new causes of action would still be deficient notwithstanding the proposed amendment, courts need not grant leave**").**

A. Undue Delay

"[U]ndue delay is a sufficient reason for denying leave to amend." *Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996). *See also Borda v. Dep't of Justice*, 306 F.Supp.3d 306, 314 (D.D.C. 2018) ("Although leave to amend must be freely granted, there are limits to that principle") (citing Fed. R. Civ. P. 1 (admonishing courts and parties to apply the rules "to secure the just, speedy, and inexpensive determination of every action")). A delay of two years between the filing of the initial action and the request to amend has been found to be generally "undue" and suggests prejudice to the defendant. *See id*. at 427 (delay of two years from filing of action undue); *Borda v. Dep't of Justice*, 306 F.Supp.3d 306, 314 (D.D.C. 2018) (delay of forty-two months from when Borda filed this suit to when he sought leave to amend the complaint and he could easily have sought leave to amend long before he did so); *Brown v. FBI*, 744 F.Supp.2d 120, 123 (D.D.C. 2010) (delay of two years undue); *Hoffmann v. United States*, 266 F.Supp.2d 27, 33 (D.D.C. 2003) (delay of five years from time "plaintiffs concede[d] that they had at their disposal all the facts necessary to raise the claims raised for the first time here" undue).

In this matter, Plaintiffs' 29-month delay is "undue delay." Plaintiffs filed the complaint in this action in April 2020. ECF No. 1. To request amendment of the complaint now—more than two years after the initial filing—consists of an undue delay that undermines the 'speedy' determination of this action. Defendant, after exerting considerable efforts to respond to

Plaintiffs' complaint, is prejudiced by an eleventh-hour amendment, especially since the amendment at issue was available to Plaintiffs throughout the course of this 29-month action. Moreover, Plaintiffs and their counsel have experience as FOIA participants and litigators. *See McDaniel v. Nat'l Archives,* 20cv1735 (RCL) (Plaintiff members); *Sauter v. Dep't of State*, 17cv1596 (RCL) (Plaintiff members). *See also McDaniel v. Nat'l Archives*, 20cv1735 (RCL) (John Clarke as counsel); Hall *v. CIA*, No. 04cv814, 2022 WL 2528102 (D.D.C. July 7, 2022) (John Clarke as counsel); *Accuracy in Media v. Dep't of Defense*, 14cv1589 (EGS) (John Clarke as counsel); *Accuracy in Media v. Nat'l Transp. Safety Board*, 03cv024 (CKK) (John Clarke as counsel); *Accuracy in Media v. CIA*, 00cv2496 (DAR) (John Clarke as counsel); *Accuracy in Media v. Office of Independent Counsel*, 99cv3448 (ESH) (John Clarke as counsel). Indeed, Plaintiffs' counsel was the plaintiff counsel of record in the *Hall v. CIA* matter in which the plaintiffs invoked the procedural challenge to the CIA's classification of records under 50 U.S.C. § 3141. 2022 WL 2528102, at *1. Thus, at the time they filed this present matter, Plaintiffs and their counsel were well-aware of the procedures that they needed to invoke to challenge any withholding of classified documents. Nevertheless, they waited over 29 months to raise the procedural challenge, without any explanations of their undue delay.

Additionally, the lack of a good reason for the delay is also relevant to the determination of whether leave to amend should be granted. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 247–48 (D.C. Cir. 1987) (affirming denial of leave to amend when plaintiff had "offered no explanation for its tardiness" and "had abundant opportunity" to previously "raise the issue"); *James Madison Proj. v. Dep't of Justice*, 208 F.Supp.3d 265, 280 (D.D.C. 2016) (delay of approximately six months after being put on notice that complaint did not reflect all requests was undue because "Plaintiff provide[d] no reason for th[e] delay").

Nowhere in Plaintiffs' Motion to Amend do they make any assertion of new facts or other explanation for their delay, nor can they. *See generally*, Pl. Motion For Leave to Amend Complaint (ECF No. 42). The only change in circumstances is the Plaintiffs' after-the-fact narrowing of the FOIA by striking "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," and to changing the request for all U.S. prisoners of war to records regarding Captain Moore. ECF No. 42 at 3, 10. But these changes are not "new" facts that explain their long delay. Indeed, they are seemingly a last minute attempt to slow the finalization of this case. As noted above, Plaintiffs had "abundant opportunity" to raise the matter in the initial complaint. Plaintiffs. Their counsel knew of the statutory requirements for challenging a classification of records, *Hall v. CIA,* 2022 WL 2528102, and Plaintiffs were well-aware that CIA had issued a *Glomar* response for the very documents sought here. *Sauter v. Dep't of State*, 17cv1596 (RCL) at ECF No. 30-1.

In the context of FOIA, courts in this Circuit have also acknowledged that the "considerable time and effort briefing summary judgment on the issues presented in" a FOIA case weighs against granting leave to amend after summary judgment briefing has begun. *Borda*, 306 F.Supp.3d at 313; *James Madison Proj*., 208 F.Supp.3d at 280; *see also Sai v. Transp. Sec. Admin*., 155 F.Supp.3d 1, 7–8 (D.D.C. 2016) (denying leave to file a supplemental pleading adding new FOIA requests because their addition "would merely result in undue delay in the disposition of this case and would not enhance judicial efficiency"). A "plaintiff, quite simply, cannot be permitted to 'circumvent the effects of summary judgment by amending the complaint every time a termination of the action threatens.'" *Hoffmann v. United States*, 266 F.Supp.2d 27, 34 (D.D.C. 2003) (quoting *Glesenkamp v. Nationwide Mut. Ins. Co*., 71 F.R.D. 1,

4 (N.D.Cal.1974))). This is especially true when the timing of the amendment comes on the eve of an announced anticipated filing of an adverse motion for summary judgment, the plaintiff has been made aware of the basis of the pending dispositive motion, and the plaintiff makes no attempt to identify or correlate any "new" or "additional" evidence that explains the delay in the filing, which suggests that it is nothing more than an effort to avoid the consequences of a potentially devastating summary judgment motion. *Wardell v. City of Chicago*, CA No. 98 C 8002 and 99 C 1856, 2001 WL 849536, *4 (N.D. Ill. July 23, 2001).

Here, Defendant spent considerable time and effort responding to the initial requests and preparing the summary judgment, with the supporting declaration and *Vaughn* Index. It is only now, when this matter is in the final stages and Defendant has been preparing the final submissions that would dispose of the matter that Plaintiffs decide to change their tactics and formally challenge the CIA's classification. This is the kind of conduct that the court in *Borda*, *James Madison Proj*., and *Sai* sought to avoid.

B. Futility

Even if the Court were to find that the late-filed amendment does not cause undue delay, it should still deny the motion because the amendment is "futile." Leave to amend a complaint should be denied when amendment would be "futile." *Foman*, 371 U.S. at 182. This includes amendments that are legally or factually deficient or would not otherwise survive a motion to dismiss. *American Center for Law and Justice*, 254 F. Supp. 3d at 224. *See also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (futility includes factual deficiency). In the present matter, Plaintiffs' amendment is both factually and legally deficient.

In order to comply with the requirements of the National Security Act, the party challenging the CIA's withholding must produce a sworn written affidavit based on personal

knowledge that presents some prima facie evidence that "the requested records were improperly withheld because of improper placement solely in exempted operational files." 50 U.S.C. § 3141(f)(3). To provide that evidence, Plaintiffs here submitted, with their Amended Complaint, an affidavit that fails to meet this requirement. Specifically, the sole challenge to the CIA's classification that Kevin Shipp raises is that Section 3.3 of Executive Order 12356 "makes it mandatory to release records that are 50 years or older." ECF No. 42-2 at ¶¶ 7, 8, 10. Not only does Section 3.3 of Executive Order 12356 fail to mention any 50-year requirement, the language of Section 3.3 restricts its application to documents in the possession of the National Archives. Section 3.3 of E.O. 12356.[2]

The current operative Order that controls the classification of information in the possession of the CIA is Executive Order 13526. *See* Memorandum Opinion (ECF No. 40) at 7-8. This Court has already found that the CIA has properly complied with the classification requirements of that Executive Order, and that the records withheld and/or *Glomar'd* (if they

[2] **Sec. 3.3** *Systematic Review for Declassification.*
(a) The Archivist of the United States shall, in accordance with procedures and timeframes prescribed in the Information Security Oversight Office's directives implementing this Order, systematically review for declassification or downgrading (1) classified records accessioned into the National Archives of the United States, and (2) classified presidential papers or records under the Archivist's control. Such information shall be reviewed by the Archivist for declassification or downgrading in accordance with systematic review guidelines that shall be provided by the head of the agency that originated the information, or in the case of foreign government information, by the Director of the Information Security Oversight Office in consultation with interested agency heads.
(b) Agency heads may conduct internal systematic review programs for classified information originated by their agencies contained in records determined by the Archivist to be permanently valuable but that have not been accessioned into the National Archives of the United States.
(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

exist) are properly classified, regardless of their age. *Id.* at 8-9. Thus, even under the current Executive Order, the affidavit of Kevin Shipp fails to satisfy Plaintiffs' burden of demonstrating, factually or legally, that "the requested records were improperly withheld because of improper placement solely in exempted operational files." 50 U.S.C. § 3141(f)(3). Accordingly, the Court should deny the Motion to Amend as futile.

III. CONCLUSION

The issues relevant to the Court's disposition of this case have been briefed by the parties and the Court has already ruled on the issue of the "operational" files. Litigation eventually must come to an end, and if Plaintiffs seek to advance new claims at an appropriate time, they may do so in a future case. "[P]laintiff cannot keep this case alive indefinitely by shifting [its] legal theories at the last minute." *Price v. Unite Here Local 25*, 883 F. Supp. 2d 146, 154 (D.D.C. 2012); *see also Equity Group, Ltd. v. PaineWebber, Inc*., 839 F. Supp. 930, 932 (D.D.C. 1993) ("The Court finds that the amended complaint is merely a tactic designed to evade summary judgment, and that to allow amendment at this time would protract the litigation and thus prejudice defendant).

For all of the foregoing reasons, Defendant respectfully requests that the Court deny Plaintiffs' last-minute Motion to Amend the Complaint and set a schedule for the necessary briefing to enable the final resolution of this matter before this Court.

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar # 481052
United States Attorney

BRIAN HUDAK
Chief, Civil Division

By: /s/ *Darrell C. Valdez*
DARRELL C. VALDEZ, D.C. Bar #420232
Assistant United States Attorney
Patrick Henry Building
601 D Street, N.W., Civil Division
Washington, D.C. 20530
(202) 252-2507
Darrell.Valdez@usdoj.gov

Counsel for Defendant