No. 25-2177

United States Court of Appeals for the Fourth Circuit

MICHAEL DRIGGS, *et al.*,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY

Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia
Case No. 1:23-cv-1124 (DJN/JFA)

BRIEF OF DEFENDANT-APPELLEE

LINDSEY HALLIGAN
United States Attorney & Special Attorney

TODD W. BLANCHE
Deputy Attorney General

DENNIS C. BARGHAAN, JR.
MATTHEW J. MEZGER
Assistant United States Attorneys
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3741
Fax: (703) 299-3983
Email: Matthew.Mezger@usdoj.gov
Attorneys for Defendant-Appellee

Date: January 20, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

LEGISLATIVE MATERIALS

REGULATIONS

OTHER

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 over the claims brought by Michael Driggs *et al.*, (collectively, "Driggs") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This Court has jurisdiction over this appeal from the grant of summary judgment to the Central Intelligence Agency ("CIA") under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment to the CIA concerning the redactions made pursuant to FOIA Exemptions 1 and 3 as the redacted information is classified or protected from disclosure by two statutes and Driggs has not disturbed the presumption of good faith accorded to the CIA's affiant.

2. Whether the District Court exercised sound discretion to decline reviewing the unredacted records *in camera* when the CIA met its evidentiary burden to establish that the CIA properly redacted the information in a national security context.

3. Whether the District Court correctly held that the CIA was not required to search its operational files pursuant to the CIA Information Act and where Driggs failed to provide evidence that the CIA misplaced records in its operational files as a basis to obtain judicial review under 50 U.S.C. § 3141(f).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Driggs Submitted a FOIA Request for Records Concerning POWs-MIAs in the Korean and Vietnam Wars and the CIA Released Responsive Records

This action's genesis traces back to a FOIA request Driggs submitted to the CIA on July 12, 2023. JA23-37. Driggs sought twenty-eight separate categories of information. JA28-35. Generally, Driggs requested records of specific individuals in the Korean or Vietnam conflicts who were either deemed a prisoner of war ("POW") or missing in action ("MIA"). *See, e.g.*, JA30. Driggs also sought information from the CIA about its efforts to recover overseas POWs/MIAs. *See, e.g.*, JA28.[1]

Before the CIA acknowledged Driggs's request, Driggs sued on August 24, 2023. JA166. Over the next year, starting in March 2024 and continuing into early 2025, the CIA searched for, processed, and released responsive records to Driggs every 60 days. JA166. In total, "the CIA released 120 documents (totaling 1,578 pages) in whole or in part." JA166.

After reviewing the CIA's release, Driggs challenged twenty-three pages of redactions to a record jointly authored by the Department of Defense and the CIA,

[1] For four requesters in this case—Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter—this was not their first time seeking these records. They previously sought and unsuccessfully litigated over the same records that form the crux of this appeal. *Moore v. CIA*, 2022 WL 2983419 (D.D.C. July 28, 2022); JA166-167.

dated February 29, 2000 and entitled "A review of the 1998 National Intelligence Estimate on POW/MIA Issues on the Charges Levied by A *Critical Assessment* of the Estimate" (hereinafter, "Joint Report").[2] JA166; JA182-204 (challenged redactions).[3]

B. The CIA Redacted Portions of the Joint Report Pursuant to Exemptions 1 and 3

The CIA redacted the information on the challenged pages pursuant to Exemptions 1 and 3.[4] JA172. To support those redactions, the CIA provided the testimony (by affidavit) of Mary C. Williams. JA157-180. Ms. Williams is a senior CIA official and "hold[s] original classification authority at the TOP SECRET level" and is "authorized to assess the current and proper classification of CIA information,

[2] This brief adopts the shorthand of the record name that the CIA's affiant used. It is the same record to which the District Court referred to in its memorandum opinion as "Review of the Charges," JA961, and it is the same record to which Driggs refers to as "Review of the Charges II," Appellants Br. at 6.

[3] Briefly, for some historical context, the Joint Report was a response to a report authored by former Senator Robert Smith entitled, "A Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue" (hereinafter "Critical Assessment"). JA283-442. The Critical Assessment, in turn, was a response to the CIA's and Department of Defense's Joint Report dated November, 1998 entitled "1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue" (hereinafter, "NIE") *See* JA284, JA286.

[4] The CIA also made some redactions pursuant to Exemption 6, but these are not at issue in this appeal. *See* JA172.

up to and including TOP SECRET information," based on the classification criteria set forth in Executive Order 13,526 and any applicable regulations. JA158.

First, Exemption 1. The redactions made pursuant to Exemption 1 "satisfie[d] the procedural and the substantive requirements of [Executive Order] 13,526, which governs classification." JA172-173. The withheld information in those twenty-three pages of the Joint Report is "currently and properly classified" and "is owned and controlled by the U.S. Government." JA173. Further, the information is covered by Executive Order 13,526 because it "concerns 'intelligence activities (including covert action), [or] intelligence sources or methods' and 'foreign relations or foreign activities of the United States.'" JA173 (citation omitted).

In addition to the information being properly marked, its "unauthorized disclosure could reasonably be expected to result in damage to national security," and none of the redactions were made "to conceal violations of law, inefficiency or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security." JA173-174. The redacted portions of the Joint Report cover a range of information concerning "the priority of intelligence activities and targets; methods of collection; and classified relationships." JA174. Though the CIA acknowledged the amount of time that has passed since the underlying events at issue in the records and the Joint Report's

issuance, it stressed that "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 counterintelligence and conducting intelligence operations, thereby damaging the national security." JA174. The CIA articulated the specific harms that result if any of those three categories of information were disclosed. JA174-177.

As to the harms from disclosing the CIA's intelligence activities, the CIA explained that disclosure of the CIA's means, policies, and processes for identifying its intelligence interests and activities would permit the CIA's adversaries to "circumvent the CIA's collection efforts, damaging the [CIA's] ability to carry out its intelligence mission." JA174-175. Those consequences would occur here because the redacted portions disclose "certain priorities of specific U.S. intelligence targets, the locations of CIA activities, the targets of specific CIA operations and analysis, and [the CIA's] processes for handling intelligence information." JA175. Concerning the CIA's intelligence methods that are encapsulated in the redactions, disclosing this information would make it more difficult for "the CIA to actually collect and analyze foreign intelligence." JA175. Those harms result because disclosure would allow hostile actors "to take measures to hide their activities from the CIA or target Agency officers." JA175. Lastly, the withheld portions of the Joint Report contain information about the CIA's classified relationships—*i.e.*,

information about specific intelligence sources, methods, and activities. JA176. Revealing this subset of information would harm national security because it would demonstrate the CIA's intelligence priorities and its "information-sharing relationships with specific foreign individuals and governments." JA176. The CIA often only receives information from foreign individuals because it is shared "on the understanding that the relationship will remain secret." JA177. In short, disclosure of the redacted information would harm the United States' national security, or the relations between the United States and a foreign government, or both. JA177.

Second, Exemption 3. The CIA explained that it made redactions pursuant to Exemption 3 because of the National Security Act of 1947, 50 U.S.C. § 3024(i)(1) or the CIA Act of 1949, 50 U.S.C. § 3507. JA177. Under the direction of the Office of the Director of National Intelligence, the CIA must protect CIA intelligence sources and methods from unauthorized disclosure. JA178. The redacted information, as the CIA explained, concerned the priority of intelligence activities and interests, and also methods of collections, which includes human sources. JA177-178. Under the CIA Act, the CIA must also protect the "titles, names, identification numbers, functions, and organization information related to CIA employees" which was at issue here. JA179.

The CIA explained that Exemptions 1 and 3 "apply independently and co-extensively to the challenged portions of the Joint Report." JA178-179.

II. DISTRICT COURT PROCEEDINGS

A. Procedural History

Driggs initiated this action on August 24, 2023. JA3. After the CIA answered the Complaint in October 2023, the CIA continued to process Driggs's FOIA request. JA003. On January 30, 2024, the District Court held a status conference and directed the parties to resolve all outstanding disputes by March 22, 2024. JA004. The CIA moved for clarification of the District Court's January 30, 2024 Order. JA004. That motion prompted the District Court to hold another status conference on March 13, 2024. JA005; JA131-141 (transcript of status conference).

During that March 2024 status conference, the District Court directed the parties to confer and "work out a rolling production [schedule] such that you get it done by Thanksgiving." JA134; JA138-139. Driggs also indicated that he would submit a position paper by March 22, 2024 for the District Court to consider regarding the need for the CIA to search its operational files. JA139-140. With the District Court's consent, Driggs submitted a memorandum and proposed order that would direct the CIA to search its operational files for responsive records. JA005, JA140. Construing that memorandum as a motion, the District Court issued a memorandum opinion on May 21, 2024 that denied Driggs's motion. JA005, JA155.

While Driggs's motion regarding the operational files was pending, and throughout 2024, the CIA processed and released responsive records to Driggs.

JA005-006. Though the CIA strived to meet the Thanksgiving deadline, the CIA later sought an extension to complete the final release of records by January 10, 2025, which was granted. JA006. After the CIA released all responsive records, the parties met and conferred in late-January 2025 to address the remaining issues in the case that required resolution at summary judgment. JA006, JA964-965. In spring 2025, The parties cross moved for summary judgment and Driggs also moved for *in camera* inspection of the Joint Report. JA007-008. In a thorough and well-detailed memorandum issued by the District Court on August 6, 2025, the District Court entered judgment in the CIA's favor and denied Driggs's motion for summary judgment and *in camera* review. JA994. Driggs timely noticed an appeal to this Court from that final judgment. JA996.

B. District Court Decisions

1. Operational Files

The District Court, through its Order dated May 21, 2024, rejected Driggs's contention that the CIA was required to search its operational files pursuant 50 U.S.C. § 3141. JA145-155. Driggs's request for searching the CIA's operational files turned on the applicability of the CIA Information Act of 1984. JA146. The act, as the District Court noted, "defangs FOIA's provisions almost entirely" because it empowers the CIA Director to exempt "'operational files' from 'publication[,] disclosure, or search or review in connection therewith.'" JA147 (quoting 50 U.S.C.

§ 3141(a)). This is consistent with Congress's recognition that the CIA's operational files "contain[] the most sensitive information directly concerning intelligence sources and methods" and thus "imposed a *per se* rule that would reduce the endless administrative burden on the CIA of searching and then inevitably exempting its operational files from FOIA disclosure." JA146-147 (citation omitted). Despite this default rule, as the District Court correctly observed, there is a "narrow path for judicial review." JA148.

Judicial review under this provision is available only "[i]f a court finds that the CIA improperly withheld requested records because of failure to comply with any provision of § 3141, the court shall order the CIA to search and review the appropriate exempted operational files and, if appropriate to disclose the records improperly withheld." JA148 (cleaned up). The District Court correctly concluded that Driggs failed to meet the burden for judicial review because he failed to "explain[] how the CIA fell out of compliance with this § 3141." JA153. Though the District Court credited the two affidavits Driggs attached to the Complaint, it rightly held that Driggs failed to show that "the CIA has (1) withheld records (2) because of (3) noncompliance with § 3141." JA153.

After reviewing the Complaint and affidavits, the District Court noted that Driggs's basis for the request to search the operational files was based on "whether the CIA over-classifies documents." JA154. "But whether a document should remain

classified has nothing to do with whether the CIA has improperly withheld requested records because of failure to comply with any provision of 50 U.S.C. § 3141." JA154 (cleaned up). Indeed, "an improper-placement theory of noncompliance with § 3141 requires demonstration not that the documents requested should be declassified, but that the documents requested have been withheld *solely* because they were placed" within the exempted categories of operational files incorrectly. JA154. Compounding the error in Driggs's contention was that he "*could not have* satisfied subsection (f)(6)'s requirements, because [Driggs] could not (and, indeed, do not) show that the CIA has withheld responsive records in the first place." JA154. Thus, the CIA had no obligation to search its operational files for responsive records to Driggs's request. JA155.

2. Summary Judgment and *In Camera Review*

In a comprehensive opinion dated August 6, 2025, the District Court entered summary judgment in the CIA's favor and denied Driggs's motion for *in camera* inspection for the unredacted records. JA959-993. As a threshold matter, the District Court clarified the outstanding issues and addressed the CIA's collateral estoppel defense. JA968.[5]

[5] As to collateral estoppel, the District Court properly concluded that in *Moore v. CIA*, 2022 WL 2983419 (D.D.C. July 28, 2022), Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter litigated "the propriety of withholding the [Joint Report]—the same document that [Driggs] seek[s] in this instant litigation." JA974. Though the District Court appreciated that in *Moore*, the CIA withheld the

With those threshold issues resolved, the District Court addressed Driggs's challenges to the CIA's redactions to the Joint Report under Exemptions 1 and 3. Because the CIA justified its redactions to the Joint Report with an affidavit, the District Court addressed Driggs's contention that the CIA's affidavit should be given little (if any) weight considering the CIA's underlying bad faith. JA976. Acknowledging that "[a]gency affidavits receive a presumption of good faith" and that "[t]he deference attendant on this presumption applies especially in the national security context," the District Court rejected Driggs's invitation to conclude that the CIA acted in bad faith based on the argument that "the CIA is engaging in a cover up *today* by not disclosing the challenged redactions." JA976-977.

The District Court rightly noted that this argument is contrary to the "weight of the case law" and held that "agency bad faith must relate to the present FOIA action in order to defeat the presumption of good faith afforded to agency affidavits." JA981. Along similar lines, the District Court addressed the CIA's putative bad faith in connection with its FOIA responses and affidavits. JA981. After reviewing Driggs's submissions, the District Court found, as a factual matter, that the evidence

---

Joint Report in full, whereas the CIA redacted select pages of the Joint Report here, that distinction was irrelevant. JA974. Notwithstanding this distinction, the District Court held that *Moore*'s conclusions regarding the withholding under Exemptions 1 and 3 were essential to *Moore*'s final and valid judgment. JA974-975. Accordingly, the District Court held that collateral estoppel barred these four overlapping requesters and "dismissed those Plaintiffs." JA975.

from 1998 and 2016 "cannot speak to the CIA's response to the instant FOIA requests, which were made in 2023." JA981. As such, the District Court held that Driggs did not substantiate his assertion that the CIA engaged in bad faith. JA981-982.

After resolving that evidentiary question, the District Court addressed whether CIA properly justified the challenged redactions to the Joint Report. JA982-992. As to Exemption 1, the District Court held that the CIA established that the redacted information in the Joint Report was properly classified pursuant to Executive Order 13,526. JA983. Per the District Court, the CIA's affiant satisfied the substantive and procedural requirements in the Executive Order to establish that the redacted information is classified. JA985-986. The District Court further held that the CIA's affiant "provide[d] far more than a recitation of statutory standard," provided "detail why the documents in question meet" the classification requirements, and that adding more detail to satisfy Driggs "would likely disclose the sensitive information specifically protected under FOIA." JA987.

The District Court also disagreed with Driggs that these redactions were improper because of Executive Order 13,526's automatic declassification provision or because the same Executive Order prohibits classification to conceal government wrongdoing or agency embarrassment. JA988. The District Court quickly dispatched those arguments. JA988. The automatic declassification provision could

not apply to the Joint Report as it was authored in 2000 and the "automatic declassification provision will not apply until December 31 of this year," JA988; and Driggs "failed to provide more than conclusory allegations suggest that a cover-up motivates the CIA's redactions," JA988.

As to Exemption 3, the District Court held that the CIA successfully established that the information was protected by the National Security Act of 1947 or the CIA Act of 1949. JA989-990. Though Driggs did "not contest the statutes' applicability," Driggs argued the CIA's evidence was sparse and conclusory. JA990. The District Court rebuffed that contention because "Exemption 3 requires no more than to establish that the redacted information falls within the statutes' coverage—something that the CIA's affidavit, whose good faith the Court must presume, easily accomplishes." JA991. Accordingly, Driggs's other objections were "similarly irrelevant to the legal framework governing FOIA Exemption 3," which "focuses solely on the availability and applicability of relevant protective statutes." JA991.

Lastly, the District Court addressed Driggs's request for *in camera* review of the Joint Report. JA992-993. Because the District Court "found that the CIA met its burden," it declined to exercise its discretion to review the Joint Report *in camera*. JA993.

SUMMARY OF THE ARGUMENT

1. The CIA properly redacted the twenty-three challenged pages of the Joint Report under Exemptions 1 and 3, and this Court may affirm based on either rationale. To justify those redactions, the CIA supported its assertions with an affidavit, which is afforded the presumption of good faith. As the CIA's affiant explains, the redacted information is properly classified pursuant to Executive Order 13,526 and exempted from disclosure by two separate statutes: (1) the National Security Act of 1947, 50 U.S.C. § 3024(i)(1); and (2) the CIA Act of 1949, 50 U.S.C. § 3507.

Exemption 1. Exemption 1 permits withholding information that could harm the national defense or foreign policy if the information is properly classified under an Executive Order, here Executive Order 13,526. Supported by the sworn testimony of an original classification authority, the CIA's affiant explained in detail how such harms could come into fruition if the withheld information in the Joint Report were released. The redacted information in the Joint Report concerns, among other topics, the means, methods, and potential targets of CIA intelligence-gathering activities. If those are revealed, it would hinder the CIA's intelligence-gathering mission, which is vital to the United States' national security.

Driggs concedes through silence that the CIA satisfied all of the Executive Order's procedural steps to justify the redactions. Instead, Driggs contends that the

CIA's submitted evidence was too conclusory and lacked the required specificity. The specificity that Driggs demands, however, runs contrary to what precedent requires. The CIA is entitled to justify its Exemption 1 redactions in a generic fashion. Were it to provide any further specificity, the CIA could actually contribute to the potential loss of national security or disclose the very information that the CIA is entitled to protect. For similar reasons, Driggs's objection that Exemption 1 does not apply based on a record's age falls flat. Case law confirms that the passage of time is not a relevant consideration.

Exemption 3. Exemption 3 permits withholding information specifically exempted by statute provided that the statute leaves no discretion that withholding is required. Exemption 3, unlike its sister exemptions, is different. Its applicability turns less on the specific details of any one record. Instead, the analysis turns on whether the agency identified an Exemption 3-eligible statute and whether the withheld materials fall within the statute's coverage. The CIA met both showings.

As the CIA explained, and Driggs does not contest, the two Exemption 3 eligible statutes implicated here are (1) the National Security Act of 1947, 50 U.S.C. § 3024(i)(1); and (2) the CIA Act of 1949, 50 U.S.C. § 3507. These statutes prohibit the unauthorized disclosure of "intelligence sources and methods," 50 U.S.C. § 3024(i)(1), the functions of the CIA, and the identities of CIA personnel, 50 U.S.C.

§ 3507. The CIA's affiant, as noted above, explained how the redacted information falls under the two statute's anti-disclosure provisions.

Driggs points to unnamed intelligence officials stating they have no concerns about disclosing these records and the age of these records to contend that Exemption 3 does not apply. But the opinions of unnamed intelligence officials have no bearing on these statutes' applicability, and Driggs cannot point to any statutory provision claiming that they do. The same is true of Driggs's concerns about age. Thus, the redacted information is properly covered by Exemption 3.

Good faith. When the CIA supported its redactions with an affidavit, that affiant was accorded the presumption of good faith. Driggs contends otherwise based on a lone out-of-circuit case, *Rugiero v. United States Department of Justice*, 257 F.3d 534 (6th Cir. 2001), that the CIA's underlying conduct that led to the requested records' creation can serve as evidentiary fodder for displacing the good faith presumption. Save the Sixth Circuit, this Court as well as its sister circuits have never adopted such an understanding of the good faith presumption; instead, limiting the bad faith inquiry to what is reflected (or not reflected) in the agency's supporting affidavits and the agency's handling of the request. Expanding the scope of evidence to reach the underlying conduct inevitably opens the agency to discovery on the underlying matters, and this Court has made clear that the FOIA does not serve to supplement civil discovery. Thus, as the District Court correctly held, any assertion

of bad faith must relate to the present FOIA action to defeat the presumption of good faith.

Separately justifying affirmance from that legal conclusion is the District Court's factual finding that the CIA did not engage in bad faith. This factual determination, which this Court examines under the clearly erroneous standard, is adequately supported by record evidence and should not be disturbed. After reviewing the evidence, the District Court found that Driggs's evidence was conclusory and was hard pressed to find that an affidavit from 2016 and a document written in 1998 could inform how the CIA substantively responded to Driggs's FOIA request. Moreover, the District Court found that the fact "the CIA provided the document that [Driggs is] using as evidence to suggest a cover-up further supports a finding that the CIA is acting in good faith for the purposes of this litigation." JA982. Thus, given this Court's narrow review on this factual question, there is no basis to disturb the District Court's well-supported factual finding below. The CIA's affidavit is therefore accorded good faith, and the District Court did not err in crediting it when granting summary judgment to the CIA.

2. As a potential tool to aid a district court, Congress empowered the district courts with the discretion to order *in camera* review of redacted records. However, though the district courts have this discretion, it is not appropriate for use in every case. Instead, district courts should elect to conduct an *in camera* reviews

when they cannot assess the propriety of the agency's withholdings based on the submitted evidence alone and it is not burdensome to do so. That is what the District Court did here. After concluding that the CIA met its evidentiary burden to justify the redactions under Exemptions 1 and 3, the District Court declined to review the redactions *in camera*. Under these circumstances, that was a sound exercise of the District Court's discretion.

Also undergirding the District Court's exercise of discretion were the national security dimensions of Driggs's request. As this Court has recognized, *in camera* review can burden the judiciary—and that concern is more acute in the national security context. Moreover, a review of the unredacted records was unlikely to aid the District Court given that the parties disputed the exemptions' applicability, not the records' contents. While Driggs contends the burden would not be onerous as there are only twenty-three pages at issue, this Court has rejected such an argument as a basis for review as it could lead to a *per se* rule requiring *in camera* inspection. In short, the District Court was entitled to rely on the CIA's submitted evidence, conclude that the CIA met its burden, and therefore used sound discretion when declining to conduct an *in camera* review.

3. When responding to a requester's FOIA request, the CIA Information Act exempts the CIA from searching its "operational files." 50 U.S.C. § 3141. The CIA's operational files are the CIA's most sensitive records, and thus Congress

relieved the CIA from any obligation under the FOIA to avoid disclosure of these sensitive records. Despite excusing the CIA from searching its operational files, Congress nevertheless provided requesters with an extremely narrow avenue to challenge the CIA's failure to search its operational files. 50 U.S.C. § 3141(f). The requester must allege "that requested records were improperly withheld because of improper placement solely in exempted operational files." *Id.* § 3141(f)(3).

The District Court correctly held that Driggs did not meet that required showing under § 3141(f)(3) to proceed further. Driggs contended that a search of the operational files was necessary because of the CIA's alleged tendency to over-classify operational files. Yet nothing in § 3141(b), which defines "operational files," establishes that a record's status as an operational file hinges on its classification status. It is for this same reason that Driggs's reference to the age of the requested records does not alter the analysis. At most, the record's age is relevant for purposes of § 3141(g) when the CIA conducts its decennial review. Thus, the District Court correctly held that the CIA was not obligated to search its operational files for responsive records to Driggs's request.

Finally, any challenge Driggs raises concerning the CIA's decennial review of its operational files must fail. Driggs failed to present this matter to the District Court, and thus it has not been preserved for appellate review. Separately, Driggs is also bound to the admission that the only remaining issue in the case, apart from his

previously-preserved challenge to require the CIA to search its operational files, was to the twenty-three redacted pages of the Joint Report. But even on the merits, the CIA has already published in the Federal Register that it conducted a decennial review in 2015 and started the 2025 decennial review. Both reviews apply the standards set by Congress in § 3141(g)(1).

STANDARD OF REVIEW

This court reviews a "a district court's grant of summary judgment in a FOIA action de novo." *Empower Oversight Whistleblowers & Research v. Nat'l Inst. of Health*, 122 F.4th 92, 99 (4th Cir. 2024) (citing *Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 358 (4th Cir. 2009)). As part of that review, determining whether the agency's redactions "fit[] within one of FOIA's prescribed exemptions is also a matter of law, unless the legal conclusion is based upon factual findings," which this Court will review "for clear error." *Id.* (quoting *Hunton & Williams v. Dep't of Just.*, 590 F.3d 272, 276 (4th Cir. 2010)).

While *de novo* review applies to the majority of the District Court's conclusions in this appeal, this Court "appl[ies] the abuse of discretion standard" to the District Court's decision to decline *in camera* review of the Joint Report. *Young v. CIA*, 972 F.2d 536, 538 (4th Cir. 1992). Under that standard, the District Court exercises sound discretion unless "it relies on an error of law or a clearly erroneous

factual finding." *Verisign, Inc. v. XYZ.COM LLC*, 891 F.3d 481, 484 (4th Cir. 2018) (citation omitted).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE CIA CONCERNING ITS REDACTIONS TO THE JOINT REPORT

Congress enacted the FOIA as a measure of providing the American public with some measure of transparency into the U.S. Government. *See Zaid v. Dep't of Just.*, 96 F.4th 697, 703-04 (4th Cir. 2024). Though the FOIA embraces a policy of public disclosure, "Congress recognized that 'public disclosure is not always in the public interest.'" *Id.* at 704 (quoting *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982)). Accordingly, the FOIA contains nine exemptions that "are designed to safeguard various public interests against the harms that would arise from overbroad disclosure." *Id.* (quotation omitted).

Here, the CIA withheld information in the Joint Report that was redacted under Exemptions 1 and 3 to safeguard information that, if disclosed, could harm the national security or foreign relations given that the redacted information contains intelligence methods, sources, and targets, among other sensitive subjects. Indeed, all redactions were made under Exemption 3 and the vast majority of those redactions are also accompanied by an Exemption 1 redaction. *See* JA179, JA182-

204.[6] Accordingly, in evaluating these redactions, the Court can affirm the granting of summary judgment to the CIA based on either Exemption 1 or Exemption 3. *See Goland v. CIA*, 607 F.2d 339, 349 n.50 (D.C. Cir. 1798).[7] As shown below, the CIA met its burden to establish the propriety of its redactions under both exemptions.

A. The Exemption 1 Redactions to the Joint Report are Proper Because the Information is Properly Classified Under Executive Order 13,526

Exemption 1 permits withholding information that is "(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." 5 U.S.C. § 552(b)(1). As the CIA explained, Executive Order 13,526 governs the classification of the national security information in the Joint Report that cannot be disclosed. JA172-173. Of course, "[i]n judging agency decisions and affidavits in the area of national security," "courts have given substantial weight to the expertise of the agencies charged with determining what information the government may properly release." *Simmons v. U.S. Dep't of Just.*, 796 F.2d 709, 711 (4th Cir. 1986); *accord Bowers v. U.S. Dep't*

[6] Because some of the FOIA redaction markings were inadvertently cut off, an alternate version of the challenged redactions is located at JA514, JA516-524, JA526-538.

[7] Moreover, because Driggs did not challenge the District Court's holding that collateral estoppel barred the claims of the four overlapping requesters in *Moore v. CIA*, 2022 WL 2983419 (D.D.C. July 28, 2022) regarding the redactions to the Joint Report, this Court should affirm the dismissal of these four requesters as Plaintiffs.

of Just., 930 F.2d 350, 357 (4th Cir. 1991). All told, if "the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position." *Young*, 972 F.2d at 539 (quoting *Spannaus v. U.S. Dep't of Just.*, 813 F.2d 1285, 1289 (4th Cir. 1987)).

Here, the CIA met its burden to establish that all the procedural and substantive requirements of Executive Order 13,526 have been satisfied to uphold the Exemption 1 redactions. At the outset, Driggs does not contest the CIA's satisfaction of the procedural requirements. Even if he had, such a challenge would fail on this record. The CIA's affiant is an original classification authority who reviewed the unredacted Joint Report, JA173; the information is owned by the government, JA173; the information falls within one of the delineated categories in § 1.4(c) and 1.4(d) of the Executive Order, JA173; and disclosure of the information could "reasonably be expected to result in damage to the national security," JA173-174.

As to the substantive requirements, the CIA's affiant explained at length how the redacted information in the Joint Report contains classified information concerning "the priority of intelligence activities and targets; and methods of collection; and classified relationships," and how the disclosure of that information

would harm the United States' national security or foreign relations. JA174. As an example, the "Joint Report reflects certain priorities of specific U.S. intelligence targets, the locations of CIA activities, the targets of specific CIA operations and analysis, and Agency processes for handling intelligence information." JA175. If that information is disclosed, hostile actors could potentially divine methods for circumventing the CIA's intelligence gatherings efforts and may expose foreign actors who provided information to the CIA. JA174-175. This is harmful to the national security because it "would reveal certain interests and activities of the U.S. Government and could lead to the deterioration of relationships" with foreign partners. JA175-177. All told, given the CIA's robust explanation of the redacted information in the Joint Report, JA172-179, the CIA met its burden to justify its Exemption 1 redactions. *See Bowers*, 930 F.2d at 357 ("The Supreme Court has rejected the argument that the [FOIA] requires particularized showings of interference, holding instead that the Government may justify nondisclosure in a generic fashion." (quoting *Spannaus*, 813 F.2d at 1288)); *Zaid*, 96 F.4th at 705 (holding that government can meet its evidentiary burden by "group[ing the records] into functional categories" and showing the harms that result from disclosure).

For Driggs, however, the CIA's affidavit is "conclusory and lacking in the required specificity." Appellants Br. at 29. As Driggs sees it, the CIA needed to explain how the law "applies to the redactions withholding information that the

Russians provided." Appellants Br. at 30. To state Driggs's contention is to reveal its fault. For example, for the CIA to satisfy Driggs's desired standard, it would need to identify the entity/individual that provided information in the Joint Report and simultaneously confirm that entity/individual is an intelligence source. That logic also extends to the intelligence methods, intelligence targets, and classified relationships the CIA identified at being at issue in withheld portions of the Joint Report. Such a requirement would inevitably cause the CIA to reveal the very facts it is protecting from disclosure, which the D.C. Circuit has previously and understandably rejected. *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009) ("[I]dentificiation of the source is the only purpose served by the details [requester] seeks about the source, and identification is the very danger against which the Executive Order protects."). Indeed, the need for further explanation "could actually contribute to the potential loss of national security." *Id.*

It is for good reason that to meet its burden under Exemption 1, the agency is only required to sufficiently demonstrate, "to the extent possible *without revealing* classified information," how the redactions meet the standards of the identified executive order. *Id.* at 864 (emphasis added). Introducing a new piece of information that is not appropriate for the public view has reaching consequences. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). "The significance of one item of information may frequently depend upon knowledge of many other items of

information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* at 1318; *accord Bowers*, 930 F.2d at 355. To that end, "[t]he CIA has the right to assume that foreign intelligence agencies are zealous ferrets," as the United States' adversaries may use each minor detail, "much like a piece of jigsaw puzzle" and begin to assemble it into something that could harm the nation. *Larson*, 565 F.3d at 864 (citation omitted). That is why "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts." *Bowers*, 930 F.2d at 357. The CIA met that burden here, and as the District Court found, "the level of precision sought by [Driggs] would likely disclose the sensitive information specifically protected under FOIA, running contrary to Congress's express intent in crafting the various FOIA exemptions." JA987.

Driggs also contends that the CIA fails to explain "how, if at all, the passage of time figures into its position." Appellants Br. at 29. Yet Driggs does not explain its legal relevance. Put simply, the passage of time is not a factor in this analysis. *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1183 (D.C. Cir. 1996) ("[T]he mere passage of time is not a per se bar to reliance on exemption 1."); *Fitzgibbon v. CIA*, 911 F.2d 755, 763 (D.C. Cir. 1990) ("[W]e reject Fitzgibbon's contention that the District Court was under an obligation to consider the effect of the passage of time on the documents in question."). In fact, there are logical reasons why protection is

still needed after many years. *Wolf v. CIA*, 473 F.3d 370, 377 (D.C. Cir. 2007) ("[I]t is logical to conclude that the need to assure the confidentiality to a foreign source includes neither confirming nor denying the existence of records even *decades* after the death of the foreign national." (emphasis added)). Of course, the CIA addressed the Joint Report's age and nevertheless concluded that "[d]espite the passage of time" the release of the information "could significantly impair the CIA's ability to carry out its core missions of gather and analyzing foreign intelligence . . . thereby damaging national security." JA174.

B. Redactions to the Joint Report Under Exemption 3 Were Justified Given the Anti-Disclosure Provisions of the National Security Act and the CIA Act

Exemption 3 applies to all information "specifically exempted from disclosure by statute" provided that said 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." 5 U.S.C. § 552(b)(3); *accord Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 590 (4th Cir. 2004). "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (citation omitted); *Larson*, 565 F.3d at 865.

Here, two statutes preclude disclosure of the redacted information in the Joint Report: (1) the National Security Act of 1947, 50 U.S.C. § 3024(i)(1); and (2) the CIA Act of 1949, 50 U.S.C. § 3507. JA177. As even Driggs does not contest, these are statutes that "may be used to withhold information under Exemption 3." *DiBacco v. Dep't of Army*, 926 F.3d 827, 834 (D.C. Cir. 2019). The plain text confirms this. The National Security Act requires that the Director of National Intelligence "shall protect . . . intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). When upholding a prior version of this statute as a withholding statute under Exemption 3, the Supreme Court observed that "Congress gave the Agency broad power to control the disclosure of intelligence sources." *CIA v. Sims*, 471 U.S. 159, 173 (1985);[8] *Fitzgibbon*, 911 F.2d at 760-61. Similarly, the CIA Act exempts the CIA from "the provisions of any other law which require the publication or disclosure of the organization or functions of the [CIA], or of the names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. Given these clear prohibitions on the unauthorized disclosure of the covered

[8] At the time the Supreme Court examined this provision in *Sims*, the authority to safeguard information rested with the Director of the CIA. However, when Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3651 (2004), the duty of protecting intelligence sources and methods transferred from the CIA to the Office of the Director of National Intelligence.

information, these statutes meet the threshold eligibility standard for Exemption 3. *See* 5 U.S.C. § 552(b)(3)(i).

As discussed above, there can be no doubt that the redacted information falls within the two statutes' coverage. The CIA's affiant confirmed that the redacted information concerns "intelligence sources and methods" and "titles, names, identification numbers, functions, and organization information related to CIA employees," JA178-179, such that the redacted information falls within the provisions prohibiting disclosure under 50 U.S.C. §§ 3024(i)(1), 3507. Per the District Court, "[t]he CIA's affidavit describes how disclosure could compromise those types of information." JA990 (citing JA174-179). Thus, Driggs's argument to the contrary falls short. Appellants Br. at 28. Accordingly, and in furtherance of the CIA's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," *Sims*, 471 U.S. at 175, withholding the redacted information was appropriate under Exemption 3.

Driggs rejects this conclusion and argues Russian and American intelligence officials have expressed no concerns about the disclosure of this information and that the record's age justifies disclosure. Appellants Br. at 28-29 (quoting JA908). But neither statute permits disclosure based on the opinions of unnamed intelligence officers or the passage of time since the record's creation. And for good reason; as

the Supreme Court made plain, Congress "chose to vest the Director of [National] Intelligence with the broad discretion to safeguard the Agency's sources and methods of operation." *Sims*, 471 U.S. at 174-75. Moreover, Driggs's reliance on the Exemption 3 holding in *Allen v. CIA*, 636 F.2d 1287, 1293-94 (D.C. Cir. 1980), to require the CIA to provide greater specificity than the redacted information contains "intelligence sources and methods" is misplaced. Appellants Br. at 28. *Allen*'s holding cannot be reconciled with the Supreme Court's holding in *Sims*. *Allen* entirely relied on the very D.C. Circuit decision that the Supreme Court later *reversed* in *Sims*. *See Allen*, 636 F.2d at 1294. As *Sims* made clear for the Exemption 3 analysis, "it is the responsibility of the Director of [National] Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process" such that requiring further explanation "of why information must be withheld can convey valuable information to a foreign intelligence agency." 471 U.S. at 179-180. Thus, consistent with *Sims*, the CIA met its burden to justify why the redacted information fell within the coverage of the two statutes. Nothing more is required, and this Court should affirm.

C. The Presumption of Good Faith that Applies to the CIA's Affiant Has Not Been Disturbed

Whether this Court examines the question of good faith as a legal matter, factual matter, or both, the undisputed record evidence shows that Driggs has not

overcome the presumption of good faith accorded to the CIA's affiant. Ultimately, because the "Government fairly describe[d] the content of the material withheld and adequately state[d] its grounds for nondisclosure," and "those grounds are reasonable and consistent with the applicable law," this Court should affirm. *Spannaus*, 813 F.2d at 1289.

A. *Legal Good Faith*. Per the FOIA, "a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to . . . subsection (b)." 5 U.S.C. § 552(a)(4)(B). Thus, under this presumption, when there is "no reason to question the good faith of the agency," this Court is "entitled to accept the credibility of the affidavits." *Zaid*, 96 F.4th at 705 (cleaned up). *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991) ("We generally accord Government records and official conduct a presumption of legitimacy."). As the District Court aptly noted, "[t]he deference attendant on this presumption applies especially in the national security context." JA976. Indeed, per *Simmons*, "[i]n judging agency decisions and affidavits in the area of national security, however, courts have given substantial weight to the expertise of the agencies charged with determining what information the government may properly release." 796 F.2d at 711 (citation omitted); *Bowers,* 930 F.2d at 357. This stems from "the Executive Branch's unique insights into what adverse effects may arise from disclosure" such that some courts "*will not* ascribe bad faith to an affidavit that plausibly asserts adverse national

security consequences." *Schaerr v. U.S. Dep't of Just.*, 69 F.4th 924, 931 (D.C. Cir. 2023) (cleaned up) (emphasis added).

To the extent a requester challenges the agency's bad faith, that inquiry is limited to the agency's handling/processing of the request or the representations in the affidavit. *In re Clinton*, 973 F.3d 106, 115 (D.C. Cir. 2020) ("[A] bad-faith inquiry in a FOIA context is only relevant as it goes to the actions of the individuals who conducted the search." (citing *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771-72 (D.C. Cir. 1981)). It does not reach the agency's underlying conduct that led to the record's creation. *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979) ("The sufficiency of the affidavits is not undermined by a mere allegation of agency misrepresentation or bad faith, nor by past agency misconduct in other unrelated cases."). *Young* illustrated this when it reviewed the agency's submitted evidence. 972 F.2d at 539. There, this Court held that the district court did not abuse its discretion in declining to inspect the challenged records in camera, noting in part that the requester "d[id] not allege that the CIA acted in bad faith in its declarations." *Id.* This Court accordingly tied the analysis to the agency's submissions in the FOIA litigation. *See id.* For good reason, summary judgment can be awarded "on the basis of agency affidavits" and thus a bad faith showing would work to undermine the evidentiary basis supplying summary judgment to the agency. *Simmons*, 796 F.2d at 712. This can be achieved when the agency makes

representations that are contradicted in the public record, *Powell v. United States Bureau of Prisons*, 927 F.2d 1239, 1242 (D.C. Cir. 1991), or when the agency fails to account for responsive records in its search, *Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency*, 610 F.2d 824, 835 (D.C. Cir. 1979), among other bases.

However, enlarging the reach of the bad faith inquiry to include the underlying conduct simultaneously enlarges the scope of the FOIA action to include the underlying conduct. Indeed, that theory was previously used as a basis to justify discovery into the underlying conduct, which the D.C. Circuit later rejected. *See In re Clinton*, 973 F.3d at 114 (issuing writ of mandamus to district court that had authorized discovery to gather information in FOIA action on putative government wrongdoing reasoning that such information was not relevant to whether the agency conducted a legally adequate search in response to request). But this Court has made clear that "FOIA is not a substitute for discovery and a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA." *Charlotte Mecklenburg Hosp. Auth. v. Perry*, 571 F.2d 195, 200 (4th Cir. 1978). A FOIA action thus stays confined to the propriety of the agency's search and withholdings (if any), which is why "[w]hen the courts have permitted discovery in FOIA cases, it generally is limited to the scope of the agency's search and its indexing and

classification procedures." *Heily v. U.S. Dep't of Com.*, 69 F. App'x 171, 174 (4th Cir. 2003). Considering this, the bad faith inquiry should likewise be confined to the agency's processing of the request and/or its representations in its affidavit.

Driggs, relying on *Rugiero v. United States Department of Justice*, 257 F.3d 534 (6th Cir. 2001), contends that a requester can proffer evidence in the underlying activities that led to requested records' creation in the underlying request to establish bad faith. Appellants Br. at 12-13. But as *Rugiero* noted, its prior case *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994), "presented an unusual case and defined the collateral nature of bad faith in FOIA actions according to a very high standard that would infrequently be met." 257 F.3d at 546-47. The showing of "bad faith" in that case "went beyond the ordinary detection and prevention of criminal activity to well-documented infringements of civil liberties whose disclosure threatened public embarrassment of the FBI." *Rugiero*, 257 F.3d at 546. Those circumstances in *Jones* are not present here, and even Driggs does not contend that they are.

Even if Driggs met the bad faith standard announced by *Rugiero* (Driggs has not), that at most entitles Driggs to *in camera* review of the challenged redactions/withholdings. *See Jones*, 41 F.3d at 242-43; *Rugiero*, 257 F.3d at 546-47 ("Rugiero has simply not pointed to strong evidence of bad faith that calls into question the district court's decision not to conduct an *in camera* review of responsive documents."). It does not, as Driggs would have it, require the agency to

undo its withholdings. This comports with the Sixth Circuit's continued reemphasis that "a FOIA request is not a substitute for the normal process of discovery in civil and criminal cases." *Jones*, 41 F.3d at 250; *accord Rugiero*, 257 F.3d at 547. Thus, even with evidence of bad faith, that does not "entitle a FOIA plaintiff to circumvent the rules limiting release of documents under FOIA," *Jones*, 41 F.3d at 250, which is why the agency's withholdings are not disturbed when the requester shows the agency engaged in bad faith in the underlying activity that led to the requested records' creation.

This is why *Jones*/*Rugiero* are best understood as creating a *per se* rule for *in camera* review in certain circumstances. *See Jones*, 41 F.3d 242-43; *Rugiero*, 257 F.3d at 546-47. It is for this reason that the Court should decline to adopt *Jones/Rugiero* into its own jurisprudence in the first instance, much less extend *Jones*/*Rugiero* any further as it would contradict this Court's holding in *Young*. In the context of an argument that a district court should have ordered *in camera* review because the volume of materials was small, *Young* appreciated that accepting this "reasoning would appear to establish a *per se* rule" for *in camera* reviews and thus rejected it. 972 F.2d at 539. Extending *Jones*/*Rugiero* creates a *per se* category of FOIA matters requiring *in camera* review thereby "eviscerat[ing] the discretion Congress gave district courts" that *Young* steadfastly protected. *Young*, 972 F.2d at 539. This Court should thus decline Driggs's invitation to expand the scope of the

bad faith inquiry, and instead hold, consistent with the weight of FOIA case law, a requester can only establish bad faith by reference to the agency's handling of the request or the affiant's representations.

B. *Factual Good Faith*. This Court has a "limited role" when "reviewing the findings of a district court" concerning the factual matter of whether the CIA acted in good faith. *Willard v. IRS*, 776 F.2d 100, 104 (4th Cir. 1985). Indeed, this Court's review is limited to determining "whether (1) the district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached is clearly erroneous." *Rein*, 553 F.3d at 358 (quoting *Spannaus*, 813 F.2d at 1288). Accordingly, Driggs's request for *de novo* review of this factual question must be rejected as the fact-finding enterprise lies squarely in the District Court's province. Appellants Br. at 9.

Irrespective of how this Court may address the legal question concerning good faith, the District Court's factual determination withstands review—especially because the alternate conclusion would transform a FOIA action into a debate about the underlying policy described in the requested records. In Driggs's view, bad faith exists because, as shown through the Critical Assessment authored by former Senator Smith, the NIE's conclusions erroneously "attacked the credibility, and reliability, of the numbers provided in the 1205/735 Documents." Appellants Br. at

5.[9] Although the NIE is not at issue in this request, its original conclusions, according to Driggs, impugn the integrity of the Joint Report and the CIA's redactions made to the Joint Report in 2024, even though the mission and purpose of the Joint Report was different from the NIE's original undertaking. *See* Appellants Br. at 15 (contending without citation that the Joint's Report's conclusion "is false, known to be false when made, and still known to be false"). In other words, even though the Joint Report's objective was "to examine the *Critical Assessment*'s charges" and "to assess the validity of those charges to evaluate the estimate's analytical vigor, objectivity, accuracy, and completeness," the Joint Report's conclusions, made with the critiques of the Critical Assessment in mind and using different methodologies from the NIE, are the same conclusions of the NIE. JA727, JA841.

Indeed, after "three months of research and analysis" that differed from the assumptions and methodologies of the NIE, the Joint Report separately concluded that "the 735 and 1205 documents are genuine GRU documents, but the information contained in them related to numbers of POWs held by the Vietnamese cannot be relied upon." JA841; JA842 ("Once again, we believed that it was our responsibility to determine whether relevant information existed that might have affected the

[9] Importantly, Driggs has not asserted that the CIA engaged in bad faith when handling his request or through its redactions. Accordingly, his bad faith theory raises and falls with this Court's determination that evidence of bad faith can be established in the agency's conduct that led to the creation of the records at issue in the request.

judgments of the NIE."). Thus, the Joint Report agreed that the "documents are genuine and that other information contained in them is valid, [b]ut the information on the numbers cannot be accurate." JA841. As the Joint Report also explained, the NIE was not intended to review the substance of the 1205/735 documents. JA840. That was the Critical Assessment's assumed expectation of the NIE, which the NIE understandably did not meet when that was not its task. JA841. Accordingly, and especially because the Joint Report was critical of the NIE, there is no factual basis to assert continued bad faith by the CIA. JA842-843.

Faced with this evidence and Driggs's submissions, the record supports the District Court's finding that Driggs "provide[d] no more than conclusory allegations" to show a "CIA cover-up in *this* litigation to avoid potential embarrassment to the agency *today*." JA981. Per *Spannaus*, a requester "is entitled to investigate and draw his own conclusions, [but] his surmises are insufficient to undermine the Government's presentation." 813 F.3d at 1289 (citing *Gardels v. CIA*, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982); *King v. U.S. Dep't of Just.*, 586 F. Supp. 286, 291 (D.D.C. 1983)). *Gardels*, which *Spannaus* favorably cited, illustrates why Driggs's evidence falls short. 689 F.2d at 1106 n.5. In *Gardels* the requester provided testimony from a former CIA employee, who declared that there would be no harm to the national security if the requested information was disclosed. *Id.* In rejecting this evidence, *Gardels* held that "[a] former agent's own position as to what

a general CIA policy should be is hardly enough . . . to call for a trial or more extensive judicial investigation." *Id.* The same could be said based on the views of a single former Senator—especially when he has not supplied any criticism to the released Joint Report, the Joint Report was authored to respond to the Critical Assessment's criticisms, and the Joint Report employed different methodologies from the NIE. That is in part why the District Court found that the Critical Assessment and Senator Smith's 2016 affidavit "cannot speak to the CIA response to the instant FOIA requests, which were made in 2023." JA981.

Separately, the District Court also found that the fact "the CIA provided the document that [Driggs is] using as evidence to suggest a cover-up further supports a finding that the CIA is acting in good faith." JA982 (citing *Turse v. Dep't of Def.*, 2025 WL 588203, at *4 (D.D.C. Feb. 24, 2025)). Indeed, the CIA provided Driggs with a redacted version of the Critical Assessment in 2016, JA34; released more portions of the Critical Assessment when responding to Driggs's request in 2024, JA915;[10] and released significant portions of the Joint Report in connection with Driggs's request after previously withholding it in full, JA166-167. Thus, the CIA has only armed Driggs with the very documents used to critique the CIA. As case law further confirms, this only underscores the good faith of the agency. *See Pub.*

[10] Of note, the CIA redacted portions of the Critical Assessment under Exemptions 1 and 3, and yet Driggs expressly waived any challenges to those redactions. JA972.

Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) ("Yet we have previously declined to find subsequent disclosure as evidence of bad faith, reasoning that to effectively penalize an agency for voluntarily declassifying documents would work mischief by creating an incentive against disclosure." (quotation omitted)). If the CIA wished to shield itself from scrutiny or embarrassment, it could have strived to withhold the entirety of these records. But it did not, and instead elected to carefully examine which portions of the Joint Report were releasable and which were not. The redacted portions therefore reflect information that is still classified (Exemption 1) and/or statutorily prohibited from disclosure (Exemption 3). Thus, the District Court's factual finding of good faith is well supported on this record.

Accordingly, with "no reason to question the credibility of the experts and the plaintiff mak[ing] no showing in response to that of the government, a court should hesitate to substitute its judgment of the sensitivity of the information for that of the agency." *Bowers*, 930 F.2d at 357.

II. THE DISTRICT COURT EXERCISED SOUND DISCRETION WHEN IT DECLINED TO REVIEW THE JOINT REPORT *IN CAMERA*

The District Court exercised sound discretion when it declined to review the Joint Report *in camera* based on the sufficiency of the CIA's affidavit. Considering that the CIA justified its redactions, the burden *in camera* review would have imposed on the District Court, and the national security context of this record, *in camera* review was not appropriate.

The FOIA authorizes district courts with discretion to conduct *in camera* review. 5 U.S.C. § 552(a)(4)(B). District courts "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section." *Id.* Though the FOIA furnishes this discretion, that does not mean *in camera* review is *required* (or even appropriate) in every case or available to requesters as a matter of right. *Young v. CIA*, 972 F.2d 536, 539 (4th Cir. 1992); *J.P. Stevens & Co. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983). The provision is "designed to be invoked when the issue before the District Court could not be otherwise resolved" based on the agency's submitted evidence. *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). In other words, the district courts are empowered to review records as an aid to the underlying dispute—provided the district court cannot reach the determination based on the agency's supporting evidence alone.

Indeed, this Court has held that district courts abuse their discretion when they order *in camera* review after the agency's submitted evidence establishes that its withholding was proper under any one of the identified FOIA exemptions. *J.P. Stevens & Co.*, 710 F.2d at 143; *Young*, 972 F.2d at 539 (affirming district court's discretion to decline reviewing records *in camera* where district court "found that the CIA had used 'sufficient specificity' in its declarations to meet the required standards for upholding nondisclosure" and there were no allegations of bad faith in

declarations). All told, when the district court reviews the agency's affidavits and "accept[s] the credibility of the affidavits" when assessing whether the agency met its burden under the FOIA, this Court "cannot hold that the district court committed an abuse of discretion." *Young*, 972 F.2d at 539.

Apart from the agency's submissions, another factor that guides the district courts' discretion is the burden of *in camera* reviews. *See Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1250 (4th Cir. 1994). This Court has noted "that such a process can be cumbersome and overburdening for the judiciary." *Id.* That is a particularly apt consideration here given that the requested records involve matters of national security. *Larson v. Dep't of State*, 565 F.3d 857, 863-64 (D.C. Cir. 2009). "*In camera* inspection is particularly a last resort in national security situations like this case—a court should not resort to it routinely on the theory that 'it can't hurt.'" *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 626 (D.C. Cir. 2011) (quoting *Larson*, 565 F.3d at 870); *Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015); *Bowers*, 930 F.2d at 357 (holding similar deference owed to national security experts when evaluating Exemption 1 withholdings).

Considering these principles, the District Court exercised sound discretion when it declined to review the Joint Report *in camera*. Consistent with *Young*, the District Court reviewed the CIA's submitted evidence and "found that the CIA met its burden here" such that there was "no need for *in camera* inspection of the redacted

documents." JA993 As explained above, *supra* Part I.A-B, the CIA's affidavit provides ample factual basis to support the Exemption 1 and 3 redactions. *Moore v. CIA*, 2022 WL 2983419, at *13 (D.D.C. July 28, 2022) (holding, based on nearly identical affidavit evidence that "*in camera* review is neither necessary nor appropriate" to review the withheld Joint Report).

Also supporting affirmance are the attendant burdens with reviewing national-security related records, which is why the District Court was right to solely rely on the CIA's public affidavit. Indeed, although there are only twenty-pages in dispute here, any review of these classified pages would require special handling and could only be reviewed by authorized personnel in authorized locations. Those necessary and "cumbersome" burdens to the judiciary are significant and must be weighed against the value gained by *in camera* review. *Ethyl Corp.*, 25 F.3d at 1250.

To that end, "*in camera* review is of little help when the dispute centers not on the information contained in the documents but on the parties' differing interpretations as to whether the exemption applies to such information." *Mobley*, 806 F.3d at 588 (quoting *Carter v. U.S. Dep't of Com.*, 830 F.2d 388, 393 (D.C. Cir. 1987)). Stated differently, the record's contents are not likely to aid a court when the FOIA exemptions' applicability hinges on an original classification authority's determination, among others, that the withheld information contains intelligence sources, or the disclosure of that information would harm the United States' national

security. That key information is derived from an agency affidavit, not necessarily the record itself. *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 944 (D.C. Cir. 2013).[11] All told, the District Court reasonably declined Driggs's invitation to review the challenged pages of the Joint Report *in camera*.

Relying on a six-factor analysis in *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980), Driggs contends that "five of the six factors" favor inspection. Appellants Br. at 32-33. This Court has never embraced a six-factor analysis. Instead, as reflected in *Young*, *J.P. Stevens*, and *Ethyl Corp.*, this Court reviews the district court's discretion against the agency's submitted evidence and burden on the district court. Distilled to its essence, Driggs's argument is akin to the one *Young* rejected—that the District Court erroneously held that the CIA met its burden to substantiate the challenged redactions and reviewing the twenty-three challenged pages would not be onerous. Appellants Br. at 32-34. Regarding burden, *Young* held that this Court must "reject" the contention that *in camera* review is necessitated when it "would have taken so little time" as that "would appear to establish a *per se* rule that district courts must make an *in camera* examination whenever the examination could be completed quickly"—thereby "eviscerat[ing] the discretion Congress gave district

[11] Of course, should a district court find that an agency's affidavit is insufficient and that *in camera* review would be unhelpful, "the appropriate remedy" can be permitting "the agency to 'submit further affidavits.'" *See Shapiro v. U.S. Dep't of Just.*, 40 F.4th 609, 615 (D.C. Cir. 2022) (citation omitted).

courts." *Young*, 972 F.2d at 538-39. Regarding the evidentiary review, the District Court "is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency." *Id.* at 539 (quoting *Spannaus*, 813 F.2d at 1289).

In sum, "*in camera* review is discretionary and is inappropriate in certain FOIA cases." *Willard*, 776 F.2d at 102 n.5. This is one of those cases, and the District Court exercised sound discretion when it declined that review.

III. THE DISTRICT COURT PROPERLY DENIED DRIGGS'S REQUEST FOR THE CIA TO SEARCH ITS OPERATIONAL FILES

A. The CIA Did Not Need to Search Its Operational Files

Though the FOIA was passed "to establish a general philosophy of full agency disclosure," Congress nevertheless limited the CIA's FOIA obligations in certain respects beyond the well-familiar exemptions listed in 5 U.S.C. § 552(b). *Empower Whistleblowers & Research v. Nat'l Inst. of Health*, 122 F.4th 92, 100 (4th Cir. 2024) (citation omitted). Indeed, when Congress enacted in the CIA Information Act, 50 U.S.C. § 3141, it removed the CIA's "operational files" from FOIA's reach. *Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007); 50 U.S.C. § 3141(b) (defining "operational files").

The CIA's operational files "memorialize the conduct and means of the government's foreign intelligence and counterintelligence efforts," and are therefore "the most sensitive of the CIA's records . . . need[ing] an extra measure of

protection." *Sullivan v. CIA*, 992 F.2d 1249, 1251 (1st Cir. 1993). This new provision helped "relieve the [CIA] from an unproductive [FOIA] requirement to search and review certain CIA operational files consisting of research and . . . records, which, after line-by-line security review, almost invariably prove not to be releasable under the FOIA." *Judicial Watch, Inc. v. CIA*, 310 F. Supp. 3d 34, 38 (D.D.C. 2018) (alterations in original) (quoting S. Rep. No. 98-305, at 1 (1983)); *Hunt v. CIA*, 981 F.3d 1116, 1121 (9th Cir. 1992).

As the statute makes plain, the CIA Director "may exempt operational files of the [CIA] from the provisions of section 552 of title 5 (Freedom of Information Act) which require publication or disclosure, or *search or review* in connection therewith." 50 U.S.C. § 3141(a) (emphasis added). Put simply, "[o]perational files are exempt from FOIA disclosure under the CIA Act." *Morley*, 508 F.3d at 1116; *accord Sullivan*, 992 F.2d at 1251. To be sure, the statute specifies three discrete categories of records that must be searched even if they meet the statute's definition of "operational files." 50 U.S.C. § 3141(c)(1)-(3). However, none of these discrete exemptions are applicable to Driggs's request, and Driggs does not claim that they are. *See* Appellants Br. at 35-38.

Although Congress categorically excused the CIA from searching its operational files except in three discrete instances, it nevertheless provided requesters an extremely narrow avenue to challenge the CIA's determination

concerning its operational files. *See* 50 U.S.C. § 3141(f). To meet this standard, the requester must allege "that requested records were improperly withheld because of improper placement solely in exempted operational files." *Id.* § 3141(f)(3). In other words, the requester is not challenging "the propriety of the agency's decision to put the requested records into properly exempted files; rather," the requester "contends that the files themselves have been improperly designated as 'operational' files." *Judicial Watch*, 310 F. Supp. 3d at 31. Should a requester meet this burden, then the district court "shall order the [CIA] to search and review the appropriate exempted operational file or files for the requested records and make such records . . . available" per the terms of the FOIA, and "such order shall be the exclusive remedy for failure to comply with this section." 50 U.S.C. § 3141(f)(6).

Here, the District Court rightly applied the statutory framework to Driggs's contention that the CIA's operational files must be searched. Before undertaking its examination of the proffered evidence, the District Court rightly expected Driggs to show "that the CIA has (1) withheld records (2) because of (3) noncompliance with § 3141." JA153. But Driggs did not meet that showing through the Smith Affidavit (JA67-117) or Shipp Affidavit (JA118-120).[12] Indeed, neither affiant discusses the

[12] It is dubious that both affiants contemporaneously executed their respective affidavits at the time of Driggs's Complaint and with knowledge of this lawsuit. The caption is missing from the Smith Affidavit (JA67), and the signature appears to be a photocopy from another document—thereby indicating that former-Senator Smith has not seen or signed this particular document (JA117). The caption is also missing

CIA's compliance (or lack thereof) with its statutory obligations for its operational files. JA67-117; JA118-120. Instead, as the District Court astutely observed, the thrust of these affidavits "focus on whether the CIA over-classifies documents." JA154. Even Driggs does not dispute that understanding of his evidentiary submission. Appellants Br. at 36. In fact, Driggs relies on that understanding as the basis for reversal given the emphasis on former Senator Smith's opinion that he has "seen hundreds of classified documents that could and should be released as they pose no national security risk." Appellant Br. at 36 (quoting JA68). Yet, as the District Court rightly held, "whether a document should remain classified has nothing to do with whether the CIA has improperly withheld requested records because of failure to comply with any provision of 50 U.S.C. § 3141." JA154.

Driggs has not meaningfully argued that this legal conclusion is error apart from his reliance on *Hall v. CIA*, No. 04-814, 2019 WL 13160061 (D.D.C. Aug. 2. 2019). But neither Driggs nor *Hall* grapples with the core provision of the statute concerning the definition of "operational files": nothing in the statute requires an operational file to be classified. 50 U.S.C. § 3141(b). Indeed, the statute defines operational files by reference to the specific CIA component and the information it contains. There is no requirement that a record be *classified* to qualify as an operational file or that it ceases to be an operational file after it reaches a certain age.

---

from the Shipp Affidavit. JA118.

See id.[13] The District Court could not have framed this better: "an improper-placement theory of noncompliance with § 3141 requires demonstrate[ing] not that the documents requested should be declassified, but that the documents requested have been withheld *solely* because they were erroneously placed within one of the 21 categories that currently stand exempt from the FOIA under § 3141(a) and (b)." JA154-155. Thus, there is no allegation in Driggs's Complaint or anything in Driggs's evidence to suggest that the CIA improperly withheld responsive records because of noncompliance with § 3141.

Compounding Driggs's evidentiary deficiencies, as the District Court rightly observed, "because [Driggs] filed suit before the CIA produced any records, [Driggs] categorically *could not have* satisfied subsection (f)(6)'s requirements." JA154. As such, there was no evidentiary basis for Driggs to assert that responsive

[13] A record's age is relevant to the CIA's decennial review process under § 3141(g), but that provision only authorizes judicial review to assess whether the CIA has *examined* whether its records should be released based on the identified statutory factors. *Infra* Part III.B. Driggs's invitation—without developed legal analysis—to read the "improper placement" requirement of § 3141(f) to mean "improper retention" would swallow the decennial review provision whole. Appellants Br. at 38. Congress already provided a means to challenge the CIA's failure to release aging records from its operational files through § 3141(g) and set limitations on the reach of that review. That provision would be superfluous if any requester could claim that a record was improperly misplaced because it was not released during a decennial review (*i.e.*, improperly retained). *United States v. Taylor*, 596 U.S. 845, 857 (2022) ("[W]e do not lightly assume Congress adopts two separate clauses in the same law to perform the same work."); *Healthkeepers Inc. v. Richmond Ambulance Auth.* 642 F.3d 466, 471-72 (4th Cir. 2011).

records were improperly placed in the CIA's operational files. 50 U.S.C. § 3141(f)(4)(A). Thus, any assertion that the CIA must search its operational files must fail.

B. Decennial Review and Automatic Declassification

Driggs seeks remand so that the CIA can articulate whether it conducted a decennial review and explain how it *will* apply Executive Order 13,526's automatic declassification provision to the Joint Report. Appellants Br. at 38-40. Neither contention justifies reversal.

1. Start with Driggs's arguments concerning decennial review. These arguments were never made to the District Court, were expressly waived, and lack merit. Though Driggs chides the CIA's declarations as being "silent regarding its 2025 decennial review," Appellants Br. at 38, that critique rings hollow. Driggs complains of a matter that he did not ask the District Court to resolve and did not identify as requiring resolution at summary judgment. *See* Dist. Ct. Dkt. Nos. 19, 23. Unless exceptional circumstances exist (which Driggs has not claimed), "parties may not raise new arguments on appeal that were not first presented to the district court." *Pyler v. Cox*, 145 F.4th 501, 512 (4th Cir. 2025).

Moreover, Driggs represented in a joint status report that "the issues that [Driggs] intend[ed] to continue to pursue in this action" were the search for records and the redactions to the Joint Report. JA972. As the District Court correctly held,

and Driggs does not challenge now, Driggs waived any other issue in the suit that was not previously preserved (*e.g.*, decennial review argument). JA972; *Genereux v. Raytheon*, 754 F.3d 51, 57-59 (1st Cir. 2014) (holding parties can waive legal positions in status reports); *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264-65 (4th Cir. 2004) (holding that judicial admissions, *i.e.*, party representations, can "release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law"); *Am. Ctr. for L. & Just. v. U.S. Dep't of Just.*, 325 F. Supp. 3d 162, 168 (D.D.C. 2018) (holding that in FOIA action parties may waive issues through status reports).

On the merits, Driggs fares no better. The statute requires the CIA to review any exempted operational files under § 3141(a) every ten years for release and such review "shall include consideration of the historical value or other public interest in the subject matter" and "the potential for declassifying a significant part of the information contained therein." 50 U.S.C. § 3141(g)(2). Should a requester sue, the statute restricts the reviewing court to two considerations: whether the CIA "has conducted the review required . . . before the expiration of the 10-year period beginning on the date of the most recent review"; and whether the CIA "considered the criteria set forth" in the statute. *Id.* § 3141(g)(3)(A)-(B); *Smith v. CIA*, 246 F. Supp. 3d 117, 125-26 (D.D.C. 2017) (holding that CIA discharged its statutory obligation through Federal Register announcements). The CIA has already

announced its 2015 and 2025 decennial reviews in the Federal Register, and both announcements indicate that the CIA has been considering or will continue to consider the requisite statutory factors. 80 Fed. Reg. 21704-01 (Apr. 20, 2015) (2015 decennial review); 90 Fed. Reg. 20999-01 (May 16, 2025) (2025 decennial review). Thus, there is no error.

2. As to the automatic declassification contention, Driggs effectively concedes that there was no error. Indeed, Driggs implicitly acknowledges that the 25-year period for the Joint Report had not elapsed at the time of the District Court's judgment and was not applicable. Appellants Br. at 39-40. Even if the chronology worked in Driggs's favor, that would not merit reversal for two reasons. First, Driggs ignores Executive Order 13,526's provision that exempts certain information from automatic declassification. *See* Exec. Order 13,526 § 3.3(b). And to that end, the redacted information in the Joint Report falls within those exemptions. JA174-177; *Moore v. CIA*, 2022 WL 2983419, at *6 (D.D.C. July 28, 2022). Second, to "prevent[] undue delay and burden in the resolution of FOIA claims" and to "introduc[e] an element of finality into agency decisionmaking," district courts "must evaluate the agency's decision under the executive order in force at the time of the classification was made." *Campbell v. U.S. Dep't of Just.*, 164 F.3d 20, 29 (D.C. Cir. 1998); *accord DiBacco v. U.S. Army*, 795 F.3d 178, 196 (D.C. Cir. 2015). Along similar lines then, to promote finality in the CIA decision making when

processing Driggs's request, nothing required the CIA to continually revisit its classification decisions in the Joint Report since they were made in 2024. *Tuchinksy v. Selective Serv. Sys.*, 418 F.2d 155, 158 (7th Cir. 1969) (holding that agency not required to "run what might amount to a loose-leaf service" by continually sending out current memoranda). That determination is fixed in time for the District Court's review and now this Court's review.

CONCLUSION

For all these reasons, the CIA respectfully requests that the Court affirm the District Court.

Dated: January 20, 2026

Respectfully Submitted,

LINDSEY HALLIGAN
United States Attorney and Special Attorney

TODD W. BLANCHE
Deputy Attorney General

/s/
DENNIS C. BARGHAAN, JR.
MATTHEW J. MEZGER
Assistant United States Attorneys
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3891/3741
Fax: (703) 299-3983
Email:Dennis.Barghaan@usdoj.gov
Matthew.Mezger@usdoj.gov

Attorneys for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 13,000 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 12,896 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/
Matthew J. Mezger
Assistant U.S. Attorney
Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, which will send a notice of such filing to all registered CM/ECF users.

/s/

Matthew J. Mezger
Assistant U.S. Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3741
Fax: (703) 299-3983
Email: Matthew.Mezger@usdoj.gov

Attorney for Defendant-Appellee

DATE: January 20, 2026