

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 25-2177
(C.A. No. 23-01124)

MICHAEL DRIGGS, *et al.*, Appellants,)
)
 v.)
)
 CENTRAL INTELLIGENCE AGENCY, Appellee.)
)
 _____)

APPELLANTS' REPLY BRIEF

On Appeal from the United States District Court for the
Eastern District of Virginia, Hon. David J. Novak, District Judge

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ARGUMENT

1. Evidence of bad faith in the underlying activities that generated the records at issue is relevant to overcome the presumption of good faith accorded to agency affidavits

Plaintiffs rely on two Sixth Circuit cases, *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994) and *Rugiero v. U.S. Department of Justice*, 257 F.3d 534 (6th Cir. 2001).

The court concluded that "Plaintiffs' invocation of the Sixth Circuit's *Rugiero* case is unavailing—neither its reasoning nor its underlying factual predicate sway the Court." *Mem. Op.* JA 980.

The CIA opines that, even where there is evidence of bad faith in the underlying activities that generated the records at issue, the courts should analyze the matter in the same manner as a routine FOIA case. The court's approach in *Jones* was decidedly different:

Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue. Where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of *Vaughn* affidavits alone. It would risk straining the public's ability to believe—not to mention the plaintiff's—that the courts are neutral arbiters of disputes whose procedures are designed to produce justice out of the clash of adversarial arguments.

Jones, id. at 242-43.

The issue in *Jones* was disclosure of records of the FBI's Counterintelligence Program targeting American civil rights activists. "COINTELPRO targeted African-Americans of local and national prominence as part of organized resistance to their struggles to secure civil rights for all Americans... It is well known, for example, that the FBI expended considerable resources attempting to undermine the work of Dr. King by linking him to allegedly subversive organizations and by discovering details of his personal life. *See Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980)." *Id.* at 241.

It is uncontested that a FOIA plaintiff may impugn the credibility of the government's affidavit by submitting evidence of bad faith in the litigation. The CIA cites ample authority for this aspect of the FOIA. But there is no authority for the proposition that evidence of bad faith in the underlying activities cannot be so employed. Thus, arguably, the district court's holding is a novel view.

In practice, this would mean that agency wrongdoing is irrelevant under the FOIA. Under this view, the fact that COINTELPRO was "a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights" (*id.*) would have been irrelevant to the issue of whether the records should be disclosed. So too, presumably, regarding disclosure of records of other criminal misconduct, such as MKUltra, extraordinary rendition, Iran-Contra, drug trafficking, search of Senate investigators' computers, and human rights violations.

Such an approach, of course, is the antithesis of the FOIA's overall goal of opening "agency action to the light of public scrutiny." *DOJ v. Reporters Committee* (1989), 489 U.S. at 772, 109 S. Ct. at 1481.

See also Department of the Air Force v. Rose (1976), 425 U.S. at 362:

Consistently with that objective, the Act repeatedly states "that official information shall be made available *to the public, for public inspection.*" *Mink, supra* at 410 U.S. 79. There are, however, exemptions from compelled disclosure. They are nine in number, and are set forth in § 552(b). But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.

2. The District Court erred in holding that plaintiffs had not met their burden to show bad faith

While the Court held that, as a matter of law, bad faith in the underlying activities that generated the records was irrelevant, it also opined on plaintiffs' proof, concluding that it is "[un]likely that Plaintiffs meet the high standard specified" in *Rugiero. Mem. Op.* JA 980. The defendant addresses this conclusion:

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] there is no basis to disturb the District Court's well-supported factual finding...

Brief of Defendant-Appellee ("*Def. Brief*") at 26.

Given that the district court held that underlying bad faith is irrelevant as a matter of law, the "District Court's factual finding that the CIA did not engage in [underlying] bad faith" is not a finding of fact upon which summary judgment was based. It is dicta. Thus, contrary to the defendant's view, the issue should not be reviewed under the clearly erroneous standard, but, rather, *de novo*. The district court's finding that it is "unlikely" that plaintiffs met their burden is decidedly not a finding of fact.

Moreover, any well-supported factual finding can only be based on the evidence in the record. The *Critical Assessment* cites 40 passages of the NIE, followed by evidence undermining all 40 passages. In lieu of rebutting *any* of the charges of CIA bad faith in its drafting of the NIE,¹ the district court ignored this evidence, as did the CIA. *See* Brief for Appellants ("*Pl. Brief*") at 17-22.

¹ *See Pl. Brief* at 19 quoting *Clarke Aff.* contents, JA 260, citing to verbatim excerpts of *Critical Assessment*, JA 270-280.

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While the district court engaged in no analysis whatsoever of the *Critical Assessment*, or *Review of the Charges II*, or of the NIE,² it cited an excerpt of the *Review of the Charges II* claiming that "the NIE did not closely scrutinize the 735 and 1205 Documents." *Mem. Op.* JA 978. The district court was referring to the following, appearing in the *Executive Summary* of the *Review of the Charges*:

Whereas Senator Smith expected an in-depth analysis of the 735 and 1205 documents and related issues, the assumptions of the IC, the NIE drafter, and the IC were quite different. They assumed that the NIE would reflect the best judgments of the IC as developed by knowledgeable analysts; they did not plan to undertake basic research and analysis. As a result of his perception of the task, the drafter of the NIE did not undertake an in-depth re-evaluation of the 735 and 1205 documents. Instead, he accepted the IC position on the legitimacy and accuracy of the documents as well as the U.S. Government's position on the basic question of numbers of POWs held by the Vietnamese. The combination of this acceptance of previous positions and the limited time allocated to completing the project prevented the NIE drafter from taking a fresh look at a number of contentious issues.

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² NIE: *National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*, 1998.

Critical Assessment: Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue, November 1998.

Review of the Charges II: A Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the charges Levied by A Critical Assessment of the Estimate, February 2000.

Clarke Aff. Exhibit C Review of the Charges II JA 729.

This paragraph, patently meant to insulate the NIE's conclusions from critique, is nonsense. The defendant supports this excuse for the NIE's contents: "As the Joint Report also explained, the NIE was not intended to review the substance of the 1205/735 documents." *Def. Brief* at 38.

Contrary to this claim that the NIE did not evaluate the reliability of the 1205 Document, the same *Executive Summary* acknowledges that the CIA did, in fact, assess the credibility of 1205 Document:

The Intelligence Community was asked to address two key issues in NIE—the extent to which Vietnam has cooperated with the United States since 1987 to achieve the fullest possible accounting of American personnel missing in action during the Vietnam conflict and the credibility of the 735 and 1205 documents, acquired from Russian archives, which raised questions about whether all American prisoners of war were released.

Clarke Aff. Exhibit C Review of the Charges II JA 726-27.

The assertion that the NIE author had "accepted the IC position on the legitimacy and accuracy of the documents," also intended excuse the contents of the NIE, entirely misses the mark. The majority of the *Critical Assessment* does not challenge the documents that the author did use, but, rather, the avalanche of evidence that it omitted, much of it provided to the NIE author at the beginning of his 16-month effort. *See Critical Assessment, Clarke Aff.* at JA 318:

Inexplicably, the NIE *neglected* to include statements by other key Russian officials since 1993 which were provided to the principal NIE drafter in early 1998. These other Russian officials commented on *both* the authenticity *and* the number of POWs referenced in the document itself (see footnote #35).

Moreover, the NIE inexplicably ignores statements by credible Russian officials since 1993, (which were provided to the NIE principal author in early 1998), indicating their judgment that the total number of referenced US POWs was true or plausible. As examples—

Even the defendant's claim that it had "limited time" to complete the *Review of the Charges* is false. The CIA issued the NIE May of 1998. Senator Smith produced his 160-page *Critical Assessment* six months later, in November of 1998. The CIA took sixteen months composing its *Review of the Charges*, until February of 2000.

As plaintiffs observed (*Pl. Brief* at 20), the CIA was specially tasked "to undertake a special National Intelligence Estimate (NIE) on the Vietnam War POW/MIA issue and to provide the ICs updated assessment of the so-called '1205' document." *Smith Aff.* ¶ 11 JA 253. It did so, but not in good faith.

Moreover, even if the only bad faith actors were CIA analysts—and not the NIE author—this circumstance would not undermine plaintiffs' position of bad faith in the underlying activities that generated the records at issue.

3. The CIA did not meet its burden to show that aged information provided by the Russians regarding unrepatriated Vietnam War POWs is exempt from disclosure

The redactions are of information that the Russians provided. The CIA justifies its redactions alleging that the information falls into one or more of four categories:

- (1) Intelligence activities or targets or locations or processes;
- (2) Intelligence methods enabling adversaries to learn how the CIA operates;
- (3) Classified relationships; and
- (4) Sources.

In response to plaintiffs' repeated question of how disclosure of the information sought could possibly implicate any interest protected by Exemptions 1 and 3, the CIA responds that plaintiffs "identify no legal authority to justify the requested granularity of detail." *Defendant's combined Reply Memorandum of Law in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment*, ECF No. 50 at 6.

Defendant argues that, "[i]n 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." *Def. Brief* at 6.

The CIA fails to provide a theory, or example, of how its redactions could implicate interest sought to protected by the Exemptions it asserts. Plaintiffs aver that the interest is to "prevent embarrassment," and that disclosure "does not

require protection in the interest of the national security," in violation of Executive Order 13,526 § 1.7.³

Here, the CIA's disclosures in this matter inculcate the government in knowingly abandoning its own citizens, and in lying about it to the public, as well to the families of POWs⁴—which is exceptionally embarrassing.

³ Executive Order 13,526 § 1.7, *Classification Prohibitions and Limitations*:

- (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:
- (1) conceal violations of law, inefficiency, or administrative error;
 - (2) prevent embarrassment to a person, organization, or agency;
 - (3) restrain competition; or
 - (4) prevent or delay the release of information that does not require protection in the interest of the national security.

⁴ See, e.g., Complaint ¶¶ 11, 13, JA 13:

Plaintiff Carol Hrdlicka lives in Conway Springs, Kansas. Her husband, Air Force Captain David Hrdlicka, piloted an F-105 over Laos on May 18, 1965, when it was shot down. In her book, *Finding David, An American Wife Betrayed by Her Government*, 2012, Carol recounts her decades-long efforts to seek information on David's whereabouts, and to secure his release.

Mark Sauter lives in Bethesda, Maryland. He has been an investigative journalist and author since 1987. He co-authored four books, including *The Men We Left Behind: Henry Kissinger, the Politics of Deceit and the Tragic Fate of POWs After the Vietnam War*, 1993, and *American Trophies, How US POWs Were Surrendered*, 2013.

Perhaps the defendant opines that disclosure might also embarrass Vietnam, with whom the United States formally normalized relations in 1995, or embarrass American politicians supporting normalization.⁵ If so, such considerations would also violate Executive Order 13,526.

4. The District Court erred in denying plaintiffs' motion for in camera inspection

The CIA relies on *Young v. CIA*, 972 F.2d 536 (4th Cir. 1992), and *P. Stevens & Co. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983). The government recites that, when the district court "accept[s] the credibility of the affidavits," this Court "cannot hold that the district court committed an abuse of discretion." "Regarding the evidentiary review," the CIA opines, "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.'" *Def. Brief* at 42.

Yes, if this Court rules that bad faith in the underlying activities is irrelevant as a matter of law, then *Young* is applicable and this Court should not find any

⁵ See Wikipedia, *United States–Vietnam relations*:

The influence of U.S. senators John McCain and John Kerry on U.S. president Bill Clinton was instrumental in the U.S. government's 1994 decision to lift the trade embargo against Vietnam... The U.S. embargo on Vietnam was eventually lifted on February 3, 1994. Formal normalization of relations was announced and occurred in 1995. (footnotes omitted)

abuse of discretion. However, because bad faith in the underlying activities is a relevant inquiry, *Young* does not apply. Thus, the standard of review is *de novo*, contrary to the CIA's position.⁶

Additionally, the CIA recites that this Court "has never embraced a six-factor analysis" employed in *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980), and, so, the fact that five of the six factors are present here,⁷ is immaterial. "Instead," the CIA posits, "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." *Def. Brief* at 44.

Here too "the agency's submitted evidence" is its affidavits, without consideration of bad faith in the activities that generated the records at issue. Thus, on this issue too this Court's analysis should include a review of plaintiffs' proffer

⁶ See *Def. Brief* at 20:

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).

⁷ See *Pl. Brief* at 32-34 listing five factors supporting review in camera: (1) Dispute Concerning the Contents of the Documents, (2) Judicial Economy, (3) Strong Public Interest in Disclosure, (4) Bad Faith, and (5) Conclusory nature of agency affidavits.

of bad faith. The CIA seems to agree: "Even if Driggs met the bad faith standard announced by *Rugiero*... 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." *Def. Brief* at 34.

5. The CIA Act's provision for a "sworn written submission" constitutes proof of failure to comply with § 3141, and "improper placement" into operational files should be read to include improper retention after 75 years

The issue here is the correct interpretation of 50 U.S. Code § 3141—*Operational files of the Central Intelligence Agency, ¶ (f)(3) Allegation; Improper Withholding of Records; Judicial Review*, which states:

when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

The district court held that § 3141(f)(3)'s provision for a "sworn written submission" set forth the pleading standard for a challenge of noncompliance under § 3141, but not proof of failure to comply with any provision of § 3141. *Mem. Op.*

JA 154.⁸ But at least one district court held to the contrary.⁹ Plaintiffs aver that the language, "the complainant shall support such allegation with a sworn written submission" is the proof of failure to comply with a provision of § 3141.

⁸ *Mem. Op.* JA 154:

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]." 50 U.S.C. § 3141(f)(6)... Indeed, even if Plaintiffs provided evidence that the CIA had withheld any records at all, and even if it were true that the documents at issue do not warrant classification, that assertion would not say even a word about the proper subject of a § 3141 (f)(3) attack—"the propriety of the agency's decision to put the requested records into properly exempted files." *Judicial Watch, Inc. v. CIA*, 310 F. Supp. 3d 34 (D.D.C. 2018).

⁹ *See Pl. Brief* at 35:

In *Hall v. CIA*, CA 04-814 ECF No. 340 at 2-3, USDC DC, Aug. 2, 2019, seeking disclosure of Vietnam era POW records, the court ordered the CIA to search its operational files, based on—"among other things—an affidavit by former Congressman Bob Smith:"

But § 3141 does not categorically absolve CIA from searching its operational records. When a FOIA requester "disputes" the adequacy of CIA's search "with a sworn written submission based on personal knowledge or otherwise admissible evidence" suggesting "improper exemption of operational files," a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)-(B); *accord, e.g., Judicial Watch, Inc. v. Cent. Intelligence Agency*, 310 F. Supp. 3d 34, 41-42 (D.D.C. 2018) (Jackson, K.B., J.). Plaintiffs do so here with—among other things— an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding

Additionally, plaintiffs posit that the proper reading of § 3141(f)(3)'s "improper placement" into operational files should be read to include improper retention.

6. Automatic Declassification Review

Defendant observes that E.O. 13,526 § 3.3, *Automatic Declassification*,¹⁰ which mandates review for disclosure of 25-year-old records, was inapplicable,

documents that should be declassified'; and that "could and should be released as they pose no national security risk." *Aff. Bob Smith* ¶¶ 8, 20, ECF No. 258-4. Yet CIA never comes close to explaining why the files remain operational, offering only generalized explanations of § 3141 and its mandatory decennial review. *See, e.g., Decl. Antoinette B. Shiner*, ECF No. 335- 1. That's not enough. To satisfy § 3141, CIA must review its operational files and explain with specificity whether any additional responsive records exist and, if so, why they must be exempt from FOIA.

Hall v. CIA, CA 04-814 ECF No. 340 at 2-3, USDC DC, Aug. 2, 2019, rev'd on other grounds *Accuracy in Media v. CIA*, 2025 WL1198024 (D.C. Cir. Apr. 25, 2025). *Unpub. Mem. Order*.

- ¹⁰ E.O. 13,526 § 3.3, *Automatic Declassification*:
- (a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that
 - (1) are more than 25 years old and
 - (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed....
 - (b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to...

because the *Review of the Charges* was authored in 2000, and the automatic declassification provision takes effect on December 31 of 2025. This is correct.

But this circumstance does not mean that such a review, and corresponding affidavit, would not be appropriate on remand.¹¹

WHEREFORE, Plaintiffs/Appellants respectfully pray that this Court:

1. Hold, as a matter of law, that bad faith in the underlying agency activities that led to the generation of the records at issue is relevant to overcome the Agency's presumption of good faith;
2. Review, *de novo*, the proffered evidence of bad faith, and to find that the Plaintiffs' proffer meets the standard to show bad faith;
3. Remand this case to the District Court with instructions that it order the CIA to:
 - (a) Submit the redacted pages at issue for in camera review;
 - (b) Search its operational records for responsive records; and
 - (c) Include in its affidavits a description of its search for responsive 25-year-old records.

¹¹ So too regarding Count IV of plaintiffs' Complaint, which plaintiffs did not argue in their dispositive pleadings, *Improper Considerations of Historical Value and Public Interest in Decennial Reviews of Exempted Operational Files under 50 U.S.C. § 3141(g)(2)*. "The CIA Act provides that 'a complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review.' 50 U.S. Code § 3141(g)(3)." Complaint ¶ 35 JA 21.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FRAP 27(d)(2)(A)

The text for this Appellants' Reply Brief was prepared using Times New Roman, 14 point, and contains 3,938 words as counted by Microsoft Word.

/s/ John H. Clarke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2026, I have caused the foregoing Appellants' Reply Brief to be served on Appellee's counsel by filing the Certificate on the Court's CM/ECF system. Counsel is a registered user.

/s/ John H. Clarke