IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICHAEL DRIGGS, *et al.*, Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	)	Case No. 1:23-cv-1124 (DJN)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant, through its undersigned counsel, respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

INTRODUCTION

Under the Freedom of Information Act ("FOIA"), agencies like the Central Intelligence Agency ("CIA") are required to conduct a search reasonably calculated to find responsive records and withhold any responsive information based on the listed exemptions in the statute. The undisputed evidence confirms that CIA discharged its duty in connection with Plaintiffs' FOIA request, which generally sought records about prisoners of war from the Korean and Vietnam wars. As the undisputed evidence confirms, summary judgment should be granted to the CIA in connection with the final two issues in this case: (1) whether the CIA properly redacted information on select pages of the Joint Report before the Senate Committee of Intelligence dated February 29, 2000 under FOIA Exemption 1 and 3; and (2) whether the CIA conducted a legally adequate search.

At the outset, much of Plaintiffs' two remaining challenges involve issues that were previously addressed in *Moore v. CIA*, 1:20-cv-1027 (D.D.C.), which involved multiple

overlapping requests for records and actually addressed the very redactions that Plaintiffs' now challenge here. For this reason, either collateral estoppel or this Court's general admonition to the parties that it would not revisit issues that were or could have been brought in *Moore* preclude much of Plaintiffs' current challenges. In *Moore*, Judge Lamberth held that the CIA properly withheld information in the Joint Report pursuant to FOIA Exemptions 1 and 3. Plaintiffs should not have a second opportunity to revisit this issue in this case. Moreover, 23 of 28 requests in this case were at issue in *Moore*. Though the *Moore* court was prepared to rule on the adequacy of the CIA's search in connection with those 23 requests, Plaintiffs instead voluntarily elected to dismiss their Complaint. Considering the extensive overlap between the FOIA requests at issue here and those at issue in *Moore*, Plaintiffs' strategic decision to forego further litigation in *Moore* should preclude them from burdening this Court with issues that could have been raised and decided in a previous case. Thus, the Court should decline to entertain most, if not all, of Plaintiffs' challenges in this case.

Even on the merits, the CIA's search and redactions are legally justified under the FOIA. First, the redactions. The redactions to the Joint Report are fully consistent with FOIA Exemptions 1 and 3. FOIA Exemption 1 permits withholding information that could harm the national defense or foreign policy if the information is properly classified under an Executive Order. As the Williams Declaration establishes, the CIA's redactions protect information properly classified under Executive Order No. 13,526, and if that classified information were disclosed, the disclosure would harm national security and foreign relations. The redacted information, among other things, concerns the means, methods, and potential targets of CIA intelligence-gathering activities, and if revealed, it could hinder the CIA's intelligence-gathering mission which is vital to the nation's national security. That is all that is necessary to invoke FOIA exemption 1. For similar reasons,

redactions under FOIA Exemption 3 are also appropriate as at least two statutes preclude the disclosure of this type of information from the public eye: the National Security Act of 1947, 50 U.S.C. § 3024(i)(1), and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 3507. Thus, the CIA's redactions to the Joint Report are properly made under the FOIA.

Second, the CIA's search. The FOIA only requires an agency to conduct a search that is reasonably calculated to find responsive records. The CIA did that just that when it searched three selected repositories for records that would be responsive to Plaintiffs' request. After considering that the majority of Plaintiffs' requests sought records that were more than seventy years old, the CIA selected appropriate records systems for its review. From there, the CIA developed search terms using Plaintiffs' requests as a reference and then ran the crafted search. The FOIA requires nothing more from the agency—especially when that search returned 130 separate records, totaling over 1,578 pages. That is more than a legally adequate search under the FOIA and thus the Court should reject Plaintiffs' challenge to the search.

All told, this Court should grant Defendant's motion and enter summary judgment in favor of the CIA.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. By letter dated July 12, 2023, Plaintiffs submitted a FOIA request to the CIA. Defendant's Exhibit ("DEX") 1 ¶ 5, Williams Declaration. That request sought 28 general sets of records. DEX 1 ¶ 5.i-5.28; *see also* Dkt. 1-1.[1]

[1] Of these 28 Requests in this case, 23 of them sought records that were previously requested in *Moore*. *See generally* Dkt. 21 at 3-5. By Plaintiffs' own admission, at least 18 of the requests in this case are duplicative of the requests in *Moore*. Dkt. 19 at 2.

A. The CIA Conducted a Reasonable Search within its File to Find Records Responsive to Plaintiffs' FOIA Request

2. Considering the age of and type of records Plaintiffs requested, CIA personnel searched three different record systems. DEX 1 ¶ 10. CIA searched: (1) indices of all archived hard-copy CIA records; (2) electronic versions of all CIA records that have been reviewed and/or compiled for potential public release; and (3) multiple repositories of non-operational intelligence reporting from various sources. DEX 1 ¶ 10.

3. CIA employed searches based on the "terms and timeframes based on the requests from Plaintiffs." DEX 1 ¶ 11.

4. As to request 1, the CIA conducted a search for the requested items using terms and variations that included: "POW/Prisoner of War" and "Communist." DEX 1 ¶ 11.i.

5. As to request 2, the CIA conducted a search for the requested items using terms and variations that included: "Preparations for Exchange" and "Information Report." DEX 1 ¶ 11.ii.

6. As to request 3, the CIA conducted a search for the requested items using terms and variations that included: "location of certain soviet transit"; "transit"; "camps"; "prisoners"; "POW"; "USSR"; "Soviet"; "Korea"; "CI File"; "040"; and "383.6." DEX 1 ¶ 11.iii.

7. As to requests 4, 5, 6, 7, 8, 9, 10, and 11, which generally sought records about a specifically named individual (or individuals), the CIA conducted a search for the requested items using the names and variations of the listed individuals. DEX 1 ¶ 11.iv.

8. As to request 12, the CIA conducted a search to locate the requested unredacted copy of the July 17, 1952 CIA Information Report that was attached to Plaintiffs' Complaint. DEX 1 ¶ 11.v.

9. As to request 13, the CIA conducted a search to locate the requested unredacted copy of the December 31, 1993 CIA Information Report that was attached to Plaintiffs' Complaint. DEX 1 ¶ 11.vi.

10. As to request 14, the CIA conducted a search to locate the requested unredacted copy of the March 24, 1954 CIA Information Report that was attached to Plaintiffs' Complaint. DEX 1 ¶ 11.vii.

11. As to request 15, the CIA conducted a search to locate the requested unredacted copy of the April 23, 1954 CIA Information report that was attached to Plaintiffs' Complaint. DEX 1 ¶ 11.viii.

12. As to request 16, the CIA conducted a search to locate the requested unredacted copy of the April 27, 1954 CIA Information Report attached to Plaintiffs' Complaint. DEX 1 ¶ 11.ix.

13. As to request 17, the CIA conducted a search to locate the requested unredacted copy of the December 8, 1954 CIA Information Report attached to Plaintiffs' Complaint. DEX 1 ¶ 11.x.

14. As to request 18, the CIA conducted a search for the requested items using terms and variations that included: "Mordovia"; "Soviet"; "Camps"; "Three"; "Americans"; and "Held." DEX 1 ¶ 11.xi.

15. As to request 19, the CIA conducted a search to locate the requested unredacted copy of the March 9, 1988 CIA Memorandum to "US Army Chief, Special Office for Prisoners of War and Missing in Action." DEX 1 ¶ 11.xii.

16. As to request 20, the CIA conducted a search for the requested items using terms and variations that included: the names provided by Plaintiffs and "Prisoner of War"; "Killed in Action"; "Missing in Action"; "Missing Person"; "Defense Prisoner of War." DEX 1 ¶ 11.xiii.

17. As to request 21, the CIA conducted a search for the requested items using the names identified in the list provided by Plaintiffs. DEX 1 ¶ 11.xiv.

18. As to request 22, the CIA conducted a search for the requested items using terms and variations that included: "CCRAK/Combined Command for Reconnaissance Activity Korea"; "Air Force 6004 Air Intelligence Service Squadron"; "Project American"; "Missing in Action Office"; "United Nations Command Military Armistice Commission"; "Air Force Office of Special Investigations"; "Naval Criminal Investigative Service"; "Army Criminal Investigation Command"; "U.S. Army Combined Command Reconnaissance Activities Far East"; and "Department of Defense." DEX 1 ¶ 11.xv.

19. As to request 23, the CIA conducted a search for the requested items using terms and variations that included "POW"; "PDB or President's Daily Brief"; "Soviet Union or USSR"; "China or PRC"; and extended the temporal scope of the search until November 30, 2023. DEX 1 ¶ 11.xvi.

20. As to request 24, the CIA conducted a search for the requested items using terms and variations that included: "MIA"; "Korea/Korean"; "Soviet Union/USSR/Russia"; "China/Chinese/PRC"; "transport/transfer/movement"; "Senate"; "Congress/Congressional"; and "House of Representatives"; and extended the temporal scope of the search to until November 30, 2023. DEX 1 ¶ 11.xvii.

21. As to request 25, the CIA conducted a search for the requested items using terms and variations that included: "Yuri or Yury Rastvorov." DEX 1 ¶ 11.xviii.

22. As to request 26, the CIA conducted a search for the requested items using terms and variations that included: "Jan Segna"; "General Sejna." DEX 1 ¶ 11.xix.

23. As to requests 27 and 28, the CIA conducted a search for the requested items using terms and variations that included: "Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by a Critical Assessment of the Estimate" and "A Critical Assessment of the 1998 National Intelligence Estimate on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue." DEX 1 ¶ 11.xx.

24. For all requests (e.g., Request Nos. 2, 12, 13, 14, 16, 19) that also sought "all intelligence material upon which [the report] was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sights reports" the CIA did not conduct a search for those items because they were "not reasonably described" and "[c]onducting a search for this material would require the [CIA] to perform research." DEX 1 ¶ 11.ii, 11.v, 11.vi, 11.vii, 11.ix, 11.xii.

25. When the CIA identified hard-copy files that were potentially responsive to Plaintiffs' requests, those files were hand-searched in their entirety, without the use of terms or filtering mechanisms, to determine whether they were actually responsive to Plaintiffs' requests. DEX 1 ¶ 10.

26. After conducting this search, the CIA identified 130 records as responsive to Plaintiffs' requests. DEX 1 ¶ 12. After conducting a more detailed review of these records to determine whether any FOIA exemptions precluded their release, the CIA released 35 records in full, 85 records in part, and withheld 10 documents in full. DEX 1 ¶ 12.

B. The CIA's Redactions to the Challenged Joint Report Properly Invoked FOIA Exemptions 1 and 3

27. Mary Williams, the CIA's declarant, is an original classification authority. DEX 1 ¶ 3. She reviewed the redacted portions of the Department of Defense and CIA's Joint Report to the Senate Committee on Intelligence dated February 29, 2000, entitled "A Review of the 1998 National Intelligent Estimate on POW/MIA Issues on the Charges Levied by A *Critical Assessment* of the Estimate" (hereinafter, "Joint Report"). *See* DEX 1 ¶¶ 13, 16.

28. Previously, in *Moore v. Central Intelligence Agency*, 1:20-cv-1027 (D.D.C.), the CIA withheld the Joint Report in full pursuant to FOIA Exemptions 1 and 3. DEX 1 ¶¶7-8. In this action, CIA released the Joint Report in part, making redactions pursuant to FOIA Exemptions 1 and 3. DEX 1 ¶ 8 & n.12. Plaintiffs' only challenge to the withholding decisions (*e.g.*, redactions) of the CIA here concerns this Joint Report. DEX 1 ¶¶ 1, 13.

1. <u>FOIA Exemption 1</u>

29. Ms. Williams determined that the information redacted in the Joint Report is currently and properly classified and that the redacted information is owned and controlled by the U.S. Government. DEX 1 ¶ 16. As such, Ms. Williams confirmed, the information CIA redacted in the Joint Report pursuant to FOIA Exemption 1 in this case meets the criteria for protection under Executive Order 13,526 as the information must be kept secret in the interest of national defense or foreign policy. DEX 1 ¶ 16.

30. The redacted information falls under the classification categories listed in § 1.4(c) and (d) of Executive Order 13,526 because the information pertains to "intelligence activities (including covert action), [or] intelligence sources or methods" and "foreign relations or foreign activities of the United States." DEX 1 ¶ 16.

31. Ms. Williams further determined that disclosure of this information could "reasonably be expected to result in damage to national security." DEX 1 ¶ 16.

32. The redacted information in the Joint Report is properly marked pursuant to marking and identification requirements of Executive Order 13,526. DEX 1 ¶ 16. Moreover, none of the information that has been redacted in the Joint Report "has been classified in order 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." DEX 1 ¶ 16.

33. The redacted information in the Joint Report concerns the priority of intelligence activities and targets, methods of collection, and classified relationships. DEX 1 ¶ 17. Despite the age of the report and date of events described in the Joint Report, "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." DEX 1 ¶ 17.

a. The redacted portions of the Joint Report contain information concerning the CIA's intelligence activities. Disclosure of the CIA's means, policies, and processes for identifying its intelligence interests and activities would permit the CIA's targets to "circumvent the CIA's collection efforts, damaging the [CIA]'s ability to carry out its intelligence mission." DEX 1 ¶ 18. Those consequences would occur here as the redacted portions of the Joint Report disclose certain priorities of U.S. intelligence targets, locations of CIA activities, targets of specific CIA operations and analysis, and the CIA's processes for handling intelligence information. DEX 1 ¶ 18.

b. The redacted portions of the Joint Report contain information concerning the CIA's intelligence methods. DEX 1 ¶ 19. Disclosure of this information makes it more difficult for "the CIA to actually collect and analyze foreign intelligence" because revealing these methods would allow targets and other hostile acts "to take measures to hide their activities from the CIA or target Agency officers." DEX 1 ¶ 19.

c. Finally, the redacted portions of the Joint Report include information about CIA's classified relationships—*i.e.*, information about specific intelligence sources, methods, and activities used operationally (*e.g.*, names of individual foreign partners). DEX 1 ¶ 20. Here, the redactions shield information regarding the process and policies for working with foreign actors and/or clandestine assets and cooperative sources who aided the CIA in its intelligence gathering mission. DEX 1 ¶ 20. Revealing this 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." DEX 1 ¶ 20. The CIA often only receives information from foreign individuals because it is shared "on the understanding that the relationship will remain secret." DEX 1 ¶ 30.

34. In sum, 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. DEX 1 ¶¶ 17-20.

2. FOIA Exemption 3

35. The CIA redacted portions of the Joint Report under Exemption 3 of the FOIA. DEX 1 ¶ 21. Portions of the Joint Report contained information that is protected by Section 102A(i)(1) of the National Security of 1947, 50 U.S.C. § 3024(i)(1) and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 3507. DEX 1 ¶ 22.

36. Under the direction of the Office of Director of National Intelligence, the CIA is required to protect CIA intelligence sources and methods form unauthorized disclosure. DEX 1 ¶¶23-24; *see also* Exec. Order No. 12,333 § 1.6(d).

37. The Joint Report contains classified information concerning the priority of intelligence activities and targets. DEX 1 ¶ 25. It also includes methods of collection, which also include human sources. DEX 1 ¶ 25.

3. The CIA Properly Conducted a Segregability Assessment and Articulated a Reason for Any Withholdings

38. For all responsive records identified in its search, the CIA conducted as "document-by-document and line-by-line review" of the information on each page. DEX 1 ¶ 26.

39. Regarding the redactions made to the Joint Report, there was "no additional information [that] may be disclosed." DEX 1 ¶ 26.

40. The CIA determined that withholding of this information was appropriate because the release of it could release information that it otherwise protected by FOIA Exemptions 1 and 3. DEX 1 ¶ 26.

STANDARD OF REVIEW

FOIA cases are properly resolved on summary judgment once records responsive to the FOIA request at issue have been identified. *See Hanson v. USAID*, 372 F.3d 286, 290 (4th Cir. 2004); *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 590 (4th Cir. 1994). In general, summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

To obtain summary judgment in this FOIA action, the CIA must show, viewing the facts in the light most favorable to the requesters (*i.e.*, Plaintiffs), that there is no genuine dispute of

material fact regarding its compliance with the FOIA. *See Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 358 (4th Cir. 2009); *Wickwire Gavin*, 356 F.3d at 590; *Steinberg v. Dep't of Just.*, 23 F.3d 548, 551 (D.C. Cir. 1994). The Court may award summary judgment based upon the information provided in affidavits or declarations when, as here, the affidavits or declarations describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Mil. Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also Rein*, 553 F.3d at 365 (relying on agency declarations to determine reasonableness of the search and propriety of the withholdings); *Carter, Fullerton & Hayes, LLC v. FTC*, 601 F. Supp. 2d 728, 734 (E.D. Va. 2009) (same). Agency declarations, such as the declarations the CIA has submitted in this case, are to be accorded a presumption of good faith. *See, e.g.*, *Bowers v. U.S. Dep't of Just.*, 930 F.2d 350, 357 (4th Cir. 1991).

ARGUMENT

I. PLAINTIFFS' REDACTION AND SEARCH CHALLENGES WERE PREVIOUSLY RAISED IN *MOORE v. CIA* AND ARE THUS PRECLUDED BY COLLATERAL ESTOPPEL OR THIS COURT'S PRIOR ADMONITION

Plaintiffs' challenge to the redactions of Department of Defense and CIA's Joint Report to the Senate Committee on Intelligence dated February 29, 2000 (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"]) and the CIA's search are hardly novel. They were both previously raised before Judge Lamberth in *Moore v. CIA*, 1:20-cv-1027 (D.D.C.). With the exception of five narrow records requests, which were not previously litigated in *Moore*, the doctrine of collateral estoppel or this Court's prior admonition—directing that anything

previously raised before Judge Lamberth cannot be raised in this case—counsel granting summary judgment to Defendant.

A. Plaintiffs' Redactions Challenge Relitigates an Issue Judge Lamberth Previously Ruled Upon When Granting Summary Judgment to the CIA in *Moore*.

Both the doctrine of collateral estoppel and this Court's directive preclude consideration of Plaintiffs' redaction challenge to the Joint Report. The Joint Report was withheld in full in *Moore* and that withholding was, as was the more limited withholding of the Joint Report here, based on FOIA exemptions 1 and 3. DEX 1 ¶¶7-8 & n.12. Judge Lamberth previously held that these exemptions were proper. Despite this, Plaintiffs press on with their second challenge to the CIA's more limited redactions to the Joint Report produced here.

Collateral Estoppel.[2] For those Plaintiffs who were part of both the *Moore* lawsuit and this case,[3] issue preclusion prevents them from challenging any redactions made to the Joint Report. These Plaintiffs should not have a second opportunity to challenge the redactions to the Joint Report. Indeed, estopping the overlapping Plaintiffs in this matter would serve the core purpose of the issue preclusion doctrine: "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and promoting judicial economy by preventing needless litigation." *United States v. Arlington County*, 669 F.2d 925, 935 (4th Cir. 1982) (quoting *Parklane Hosiery Co. v. Shore*, 43 U.S. 322, 326 (1979)).

As a general matter, the "rules of claim preclusion provide that if the later litigation arises from the same cause of action as the first, then the judgment in the prior action bars litigation 'not

[2] At the outset, Defendant acknowledges that collateral estoppel is an affirmative defense. *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). Defendant pled that affirmative defense in its answer. Ans. (Dkt. 8) at 2 (Eighth Defense).

[3] The overlapping Plaintiffs in this action and *Moore* are Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter. *See also* Dkt. 19 at 3 n.6.

only of every matter actually adjudicated in the earlier case, but also of every claim that might have been presented.'" *Orca Yachts, L.L.C. v. Mollicam, Inc.*, 287 F.3d 316, 318 (4th Cir. 2002) (quoting *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996)). To establish issue preclusion, the defendant must show that an issue of fact or law was litigated and determined by a final judgment, that said determination was essential to the court's judgment between the parties in the first action, and that the litigated issue in the first action is before the same parties in the subsequent action. *See B&B Hardware, Inc. v. Hargis Indus. Inc.*, 575 U.S. 138, 148 (2015) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (quoting Restatement (Second) of Judgements § 27 (1980))); *Orca Yachts*, 287 F.3d at 318. Of course, this Court can "take judicial notice of facts from a prior judicial proceeding when [an issue preclusion] defense raises no disputed issue of fact." *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000).

Applying these principles here, there is no doubt that Plaintiffs' redactions challenge is precluded under collateral estoppel as it was one of challenged records in *Moore*. In *Moore*, like here, CIA withheld information in the Joint Report under FOIA Exemptions 1 and 3. *See Moore v. CIA*, CIA's Vaughn Index, Dkt. 22-1 at 26 (entry 33); DEX 1, ¶ 8 n.12 (confirming that *Moore Vaughn* entry 33 is the same record in this case). There can be no question that the propriety of CIA's redactions under these two exemptions were the subject of full and fair litigation. In *Moore* Plaintiffs and Defendant alike moved for summary judgment based on the redactions to the Joint Report. *Moore v. CIA*, 1:20-cv-1027, Dkt. 25 at 27-30 (D.D.C. Jan. 17, 2022) (Plaintiffs' motion); *Moore v. CIA*, 1:20-cv-1027, Dkt. 21 at 14-24 (D.D.C. Dec. 10, 2021) (CIA's motion). In the end, the *Moore* court concluded that the CIA carried its burden to establish that the Joint Report was

properly withheld under FOIA Exemptions 1 and 3. *Moore v. CIA*, 2022 WL 2983419, at *6, *10 (D.D.C. July 28, 2022). Moreover, it is beyond dispute that this conclusion was essential to the *Moore* court's judgment for it held that CIA's summary judgment motion was granted in connection with all redactions that it made in that action—including those to the Joint Report under FOIA Exemptions 1 and 3. *Id.* at *13. Accordingly, the overlapping Plaintiffs should be estopped from challenging the propriety of redactions to the Joint Report.

Again, for purposes of issue preclusion, it does not matter if the Joint Report was once withheld in full and it is now redacted in part. The determining fact, for purposes of the defense, is that the issue of law "is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *B&B Hardware, Inc.*, 575 U.S. at 148. That was satisfied here. That some of the Joint Report has been released to the public does nothing to undermine the propriety of the CIA's remaining redactions under the FOIA. As they were legally proper in *Moore*, they are legally proper now. Plaintiffs should not get a second opportunity to revisit these same issues.

This Court's Admonition. Throughout much of this case, the Court has stressed to the parties the following: "Anything that was involved in the Judge Lamberth case, you go back to him. You don't get two bites at the apple." Dkt. 22 at 7; *id.* at 8 ("I didn't know that there had been all this litigation in D.C. on this, and Judge Lamberth had made a decision. That's a big deal for me, because I'm not going to redo what he's already done."). Despite charging the parties to present new issues for this Court to resolve, Plaintiffs nevertheless press the same redactions-related challenge to this Court as was before Judge Lamberth in *Moore*. Consistent with this Court's guidance and directives throughout this case, the CIA requests that this Court decline

Plaintiffs' request to review the redactions to the Joint Report. Plaintiffs should instead press their challenge in the United States District Court for the District of Columbia.

B. The Majority of Plaintiffs' Challenge to the CIA's Search Was Previously at Issue in *Moore* and Could have Been Resolved But For Plaintiffs' Voluntary Dismissal

As with Plaintiffs' redactions challenge, much of Plaintiffs' challenge to CIA's search was at issue in *Moore*. Consistent with this Court's general directives for this case, as noted above, Plaintiffs should ask the District Court in the District of Columbia to resolve this challenge. Were it not for Plaintiffs' voluntary dismissal in *Moore*, the *Moore* court would have already resolved the majority of Plaintiffs' current challenge to the CIA's search for requests. Indeed, the CIA's search in connection with 23 of the 28 requests could have been addressed but for Plaintiffs' voluntary dismissal, thereby underscoring that Plaintiffs' Rule 41 dismissal also has preclusive effect on this issue too.

Overlap of Issues. At the outset, Defendant wishes makes clear that not all of Plaintiffs' challenge to the CIA's search in this case is the same as in *Moore*. Stated differently, Plaintiffs' challenge to the CIA's search in connection with request numbers 6, 10, 11, 27 and 28—even considering this Court's prior admonition—is properly before this court. *Compare* Dkt. 1-1 (*Driggs* FOIA request), *with* Dkt. 21-2 (*Moore* FOIA request) *and* Dkt. 21-8 (amendment to *Moore* FOIA request). Plaintiffs concede that of the 28 requests at issue here, Requests 1, 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, and 26 "seek information sought in the *Moore* case." Dkt. 19 at 3 (chronicling, in footnotes 1 through 5, the requests in this case that Plaintiffs contend are "novel" requests). On that concession alone, Plaintiffs admit that more than half of their requests—18 to be precise—were previously at issue in *Moore*. Though Plaintiffs maintain there are ten requests that "are not duplicative of those that were the subject of the *Moore* litigation," that is incorrect. Dkt. 19 at 2. As the CIA previously explained, requests 5, 7, 8, 9, and 20 were

at issue in *Moore*. Dkt. 21 at 3-4. Thus, only the CIA's search in connection with requests 6, 10, 11, 27 and 28 should be reviewed by this Court.

Opportunity in Moore *for Search Challenge*. Of course, the CIA acknowledges that in *Moore*, Judge Lamberth denied the parties' motions for summary judgment regarding the adequacy of the CIA's records search. *Moore*, 2022 WL 2983419, at *13. In denying the motions, the Court directed the CIA to "supplement the record regarding the adequacy of the search," *id.* at *13, after acknowledging that the "CIA [did] not brief nor respond to arguments made by plaintiffs about [search] adequacy," *id.* at *3. In the months following Judge Lamberth's ruling on the parties' motions for summary judgment, the CIA had been preparing the "final submissions that would dispose of the matter." *Moore v. CIA*, 1:20-cv-1027, Dkt. 46 (D.D.C. Mar. 30, 2023). However, those submissions were not filed, and the *Moore* Court did not have a chance to assess the CIA's search, because Plaintiffs voluntarily dismissed their complaint. *Moore v. CIA*, 1:20-cv-1027 Dkt. 49 (D.D.C. Apr. 24, 2023). Given Plaintiffs' voluntary decision to end the *Moore* litigation (one that now seems entirely strategic), and consistent with this Court's prior directive, they should proceed to the United States District Court for the District of Columbia to resolve their disputes about the 23 overlapping requests between this case and *Moore*. *See also* Dkt. 18 ("Because this Court lacks jurisdiction to order the CIA to do something that it has already done, Plaintiffs' claims are moot to the extent that they seek production of documents already handed over in *Moore*." (cleaned up)).

Considering this procedural strategery, case law shows that Plaintiffs' voluntary dismissal in *Moore has* issue preclusive effect on all the overlapping requests between this case and *Moore*. *See Zapata v. HSBC Holdings PLC*, 414 F. Supp. 3d 342, 350-51 (E.D.N.Y. 2019); *Robinette v. Jones*, 476 F.3d 585, 589 & n.3 (8th Cir. 2007). Indeed, in the collateral estoppel context, "finality

may mean little more than the litigation of a particular issue has reached such a stage that the court sees really no good reason for permitting it to be litigated again." *Zapata*, 414 F. Supp. 3d at 348 (cleaned up) (quoting *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961)). To that end, there is no good reason for Plaintiffs to get the second opportunity to litigate their search challenge when it was on the cusp of resolution in *Moore*. Judge Lamberth was familiar with the summary judgment record, previously determined that there was insufficient evidence in the record to grant summary judgment to either party in *Moore*, the CIA was near finalizing its submissions to prove that its search was legally adequate, and Judge Lamberth could have resolved the search in connection with 23 out of 28 requests. Thus, notwithstanding that the *Moore* Plaintiffs voluntarily dismissed their Complaint under Rule 41, this Court should nevertheless conclude that issue preclusion prevents Plaintiffs here from relitigating that same issue.

In sum, this Court should only proceed to assess the CIA's search for records in connection with requests numbers 6, 10, 11, 27 and 28 in this case.

II. THE CIA PROPERLY REDACTED THE JOINT REPORT UNDER FOIA EXEMPTIONS 1 AND 3

The FOIA requires an agency "to disclose agency records unless they may be withheld pursuant to one of nine enumerated exemptions listed in § 552(b)." *Heily v. U.S. Dep't of Com.*, 69 F. App'x 171, 173 (4th Cir. 2003). The agency bears the burden of establishing the applicability of an exemption. *Id.* "In order to carry this burden, an agency must submit sufficiently detailed affidavits or declarations[.]" *Nat'l Sec. Counsellors v. CIA*, 206 F. Supp. 3d 241, 249 (D.D.C. 2016), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020). These materials, in whichever form, need to "demonstrate that the government has analyzed carefully any material withheld," allow the court "to fulfill its duty of ruling on the applicability of the exemption," and permit "the adversary

system to operate by giving the requester as much information as possible, on the basis of which the requester's case may be presented to the trial court." *Id.*

A. The Redactions Made to the Joint Report Pursuant to FOIA Exemption 1 Safeguard National Security Information, which is Properly Classified Under Executive Order 13,526

FOIA Exemption 1 permits withholding of information that is "(A) specifically authorized under criteria established by an Executive Order to be kept 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). Relevant here is Executive Order 13,526, which governs the classification of national security information that cannot be disclosed. Exec. Order. No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010). Of course, "[i]n judging agency decision 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. *Simmons v. U.S. Dep't of Just.*, 796 F.2d 709, 711 (4th Cir. 1986); *accord Bowers v. U.S. Dep't of Just.*, 930 F.2d 350, 357 (4th Cir. 1991) ("What fact or bit of information may compromise national security is best left to the intelligence experts. If there is no reason to question the credibility of the experts and the plaintiff makes no showing in response to that of the government, a court should hesitate to substitute its judgment of the sensitivity of that information for that of the agency.").

All told, if "the Government fairly describes the content of the material withheld and adequately states its ground for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position." *Young v. CIA*, 972 F.2d 536, 539 (4th Cir. 1992) (quoting *Spannaus v. U.S. Dep't of Just.*, 813 F.2d 1285, 1289 (4th Cir. 1988)); *see also Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978).

Here, the undisputed evidence confirms that all the substantive and procedural requirements of Executive Order 13,526 have been met for the information safeguarded by the

redactions in the Joint Report. Ms. Williams, the CIA's affiant, is an original classification authority and has reviewed the unredacted report. DEX 1 ¶ 16. As Ms. Williams has testified, the redacted information is "currently and properly classified" and the information falls under one of the protected categories of Executive Order 13,526—specifically § 1.4(c) and § 1.4(d). DEX 1 ¶ 16. If disclosed, the information could reasonably be expected to damage national security or weaken the U.S. government's relationships with other foreign actors. DEX 1 ¶¶ 17-20. Indeed, as described at length in the Williams Declaration, the redacted information pertains to information about the CIA's means and methods of intelligence gathering and intelligence targets, among other things. *See, e.g.*, DEX 1 ¶ 18. If that information is disclosed, potential hostile actors could potentially divine methods for circumventing the CIA's intelligence gathering efforts and disclosure of this redacted information may expose those foreign actors who have agreed to provide information to the CIA. DEX 1 ¶ 18. Those consequences, as Ms. Williams explained at length, would harm national security because "it would greatly impair effective collection of foreign intelligence," DEX 1 ¶ 18, and "would reveal certain interests and activities of the U.S. Government and could lead to the deterioration of relationships" with foreign partners. DEX 1 ¶ 20.

All told, as noted in *Moore*, "[t]hese explanations and the sworn affidavit from an original classification authority meet the required standard for summary judgment"—especially when "courts lack the expertise necessary to second-guess such agency opinion in the typical national security FOIA case." *Moore*, 2022 WL 2983419, at *5 (cleaned up) (quoting *ACLU v. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)).

B. The Redacted Information is Properly Withheld Under FOIA Exemption 3 as the National Security Act of 1947 and the Central Intelligence Age Agency Act of 1949 Preclude Disclosure

FOIA exemption 3 applies to all information "specifically exempted from disclosure by statute" provided that such statute either "(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). When reviewing withholdings or redactions made under this exemption, reviewing courts do not "closely scrutinize the contents of a withheld document; instead, [they] determine only whether there is a relevant statute and whether the document falls within that statute." *Wickwire Gavin, P.C. v. Def. Intelligence Agency*, 330 F. Supp. 2d 592, 601 (E.D. Va. 2004) (quoting *Krikorian v. Dep't of State*, 984 F.2d 461, 465-66 (D.C. Cir. 1993)); *accord Driggs v. CIA*, 2024 WL 2303842, at *1 (E.D. Va. May 21, 2024) (Novak, J.).

Here, two statutes preclude disclosure of the information that was redacted in the Joint Report: (1) the National Security Act of 1947, 50 U.S.C. § 3024(i)(1); and (2) the Central Intelligence Agency Act of 1949, 50 U.S.C. § 3507. DEX 1 ¶ 22. As courts have held, both statutes "may be used to withhold information under [FOIA] Exemption 3." *DiBacco v. Dep't of Army*, 926 F.3d 827, 834 (D.C. Cir. 2019); *accord Moore*, 2022 WL 2983419, at *9.

Indeed, the National Security Act establishes that the Director of National Intelligence "shall protect . . . intelligence sources and methods form unauthorized disclosure." 50 U.S.C. § 3024(i)(1). As the Supreme Court previously noted when interpreting this provision,[4] "Congress

[4] As originally enacted, section 102A of the National Security Act was codified at 50 U.S.C. § 403-1. 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 Director of the CIA to the newly created Office of the Director of National Intelligence.

gave the Agency broad power to control the disclosure of intelligence sources." *CIA v. Sims*, 471 U.S. 159, 173 (1985); *Fitzgibbon v. CIA*, 911 F.2d 755, 760-61 (D.C. Cir. 1990). Similarly, the Central Intelligence Act exempts the CIA from "the provision 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. Such language in both statutes confirms that they meet the threshold eligibility consideration for Exemption 3. *See* 5 U.S.C. § 552(b)(3)(i).

Moreover, as the undisputed evidence confirms, the redacted information falls subject to the provisions of the two statutes. DEX 1 ¶¶ 23-24. The Williams declaration confirms that the redacted information in the Joint Report pertains to matters of "intelligence sources and methods." DEX 1 ¶ 23. That means, consistent with the information disclosure prohibitions of 50 U.S.C. §§ 3024(i)(1), 3507, that the CIA has shielded information—consistent with its statutory obligation to do so—concerning "the intelligence sources and methods" that were discussed at length above. *See* DEX 1 ¶¶ 23-24; *see also* DEX 1. Accordingly, the CIA properly withheld the redacted information pursuant to FOIA Exemption 3. *Moore*, 2022 WL 2983419, at *9.

C. The CIA Released All Reasonably Segregable Portions of Exempt Records

After an agency has identified documents that contain exempt material, it must determine whether any information in the documents is reasonably segregable and can be released. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt."); *see also City of Va. Beach v. U.S. Dep't of Com.*, 995 F.2d, 1247 1253 (4th Cir. 1993); *Mead Data Ctr., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To demonstrate that all reasonably segregable material has been released, the agency must show "with 'reasonable specificity'" why a document cannot be further segregated. *Armstrong v. Exec. Off. of President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996) (citations omitted).

The agency is not required, however, to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." *Mead Data*, 566 F.2d at 261 n.55.

The CIA "conducted a document-by-document and line-by-line review" and released all reasonably segregable non-exempt information. DEX 1 ¶ 26. Upon review of the Joint Report, the CIA determine that "no additional information may be disclosed." DEX 1 ¶ 26. As noted above, that classified information is protected from disclosure under Exemptions 1 and 3 as the disclosure of the information would harm national security or disclose intelligence sources and methods, or both. DEX 1 ¶¶ 26, 17-20. In short, the CIA has released all segregable information and has provided specific reasons for why any unreleased information is not segregable.

III. THE CIA CONDUCTED A REASONABLE SEARCH FOR THE RECORDS SOUGHT IN PLAINTIFFS' FOIA REQUEST

The CIA's searches were reasonably calculated to lead to responsive records. "In responding . . . to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format[.]" 5 § U.S.C. 552(a)(3)(C). "[T]he FOIA does not require a perfect search" for responsive records from the agency, "only a reasonable one." *Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 362 (4th Cir. 2009). "[T]he relevant question is not whether every single potentially responsive document has been unearthed." *Carter, Fullerton & Hayes, LLC*, 601 F. Supp. 2d at 734. Rather, "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

A search is reasonably thorough so long as the places that are "likely to contain responsive materials" are searched. *Carter, Fullerton, & Hayes,* 601 F. Supp. 2d at 734. This means that a search remains reasonably thorough, even if responsive materials "may have [been] missed."

Iturralde, 315 F.3d at 315. The agency "has the burden of establishing the adequacy of its search and that any identifiable document has . . . been produced[.]" *Heily v U.S. Dep't of Com.*, 69 F. App'x 171, 173 (4th Cir. 2003) (citing *Carney v. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994)). "This burden may be met through affidavits explaining the manner in which the search was conducted." *Id.* "The court is entitled to accept the credibility of such affidavits, so long as it has no reason to question the good faith of the agency." *Id.* (cleaned up).

The undisputed evidence establishes that CIA took the necessary steps to identify records responsive to Plaintiffs' FOIA request and did so with a legally adequate search that met its obligations under the FOIA. To start, the CIA appreciated the age and nature of Plaintiffs' request and then tailored its search to three specific records systems. DEX 1 ¶ 10. Indeed, as Plaintiffs' request shows, some of the requested records would be potentially more than 70 years old (and thus pre-dating the digital age). DEX 1 ¶ 5 (describing request 1, which sought records from a seven-year period between 1954 to 1961). The CIA searched its indices of all archived hard-copy Agency records; electronic versions of all Agency records that have been reviewed and/or compiled for potential public release; and multiple repositories of non-operations intelligence reporting from various sources.[5] DEX 1 ¶ 10. Whenever the CIA identified a hard-copy document that was potentially responsive "those files were hand-searched in their entirety without the use of terms or filtering mechanisms." DEX 1 ¶ 10.

From there, the CIA proceeded to build search terminology based on the records that Plaintiffs requested. DEX 1 ¶ 11. Of course, "a federal agency has discretion in crafting a list of

[5] This Court previously ruled that Plaintiffs failed to meet their evidentiary burden that the CIA failed to follow the CIA Information Act. *Driggs*, 2024 WL 2303842, at *6. As such, this Court concluded that it "thus lacks any power to order the CIA to 'search and review the appropriate exempted operations file[s].'" *id.* (quoting 50 U.S.C. § 3141(f)(6)). Accordingly, the CIA's search is not legally inadequate because a search for records was not made in the CIA's operational files.

search terms that they believe to be reasonably tailored to uncover documents responsive to the FOIA request." *Boundy v. U.S. Pat. &Trademark Off.*, 2023 WL 2567350, at *6 (E.D. Va. Mar. 17, 2023) (quoting *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015)). As evident from the Williams declaration, the CIA identified search terms that would reasonably lead to potentially responsive records. DEX 1 ¶ 11. For example, consider the CIA's searches for identifying records in connection with Plaintiffs' Request 6. DEX 1 ¶ 11.iv. Plaintiff's Request 6 generally sought "[a]ll records concerning Ensign Dwight Clark Angell." DEX 1 ¶ 11.iv. To identify any potentially responsive records, the CIA built a search using the servicemembers' name and variations thereof. DEX 1 ¶ 11.iv. That search is reasonably calculated to identify records responsive to Plaintiffs' request. Though Request Number 6 was used as an example, the CIA's searching methodology applied to all of Plaintiffs' requests. *See* DEX 1 ¶ 11. The FOIA does not require more: "A reasonably calculated search does not require that an agency search every file where a document could possibly exist, but rather requires that the search be reasonable in light of the totality of the circumstances." *Rein*, 553 F.3d at 365.

Accordingly, judgment should be entered in the CIA's favor given that the undisputed evidence confirms that its search for records complied with the FOIA.

CONCLUSION

For all these reasons, the CIA respectfully requests that the Court grant its motion and enter judgment in its favor.

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Respectfully submitted,

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By: /s/

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