

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHAEL DRIGGS, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:23-cv-1124 (DJN)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully submit the following in support of their prayer that the Court deny Defendant's Motion for Summary Judgment and grant Plaintiffs' cross-motion.

Contents

I.	BACKGROUND AND REDACTIONS AT ISSUE	
A.	Background.	2
B.	Redactions at Issue.	3
II.	ISSUE PROPERLY BEFORE THE COURT.	4
A.	Collateral Estoppel Inapplicable.	4
	1. Different Requests.	5
	2. Different Issues.	6
	3. Different Records.	7
	4. Different Parties.	8
B.	Plaintiffs' Issues Not Contrary to the Court's Admonition. . .	9
III.	BAD FAITH.	11
A.	National Intelligence Estimate.	12
B.	Redaction of Accounts of Russian Officials	13
	1. Response to the Charges II.	14
	2. Critical Assessment.	15
IV.	CIA FAILS TO MEET ITS BURDEN TO SHOW REDACTED INFORMATION EXEMPT FROM DISCLOSURE.	15
	PLAINTIFFS' STATEMENT OF FACTS TO WHICH THERE IS NO GENUINE ISSUE.	20
	RESPONSE TO DEFENDANT'S STATEMENT OF FACTS. . .	23

I. BACKGROUND AND REDACTIONS AT ISSUE

A. Background

1205 Document. In December of 1992, Harvard University's Dr. Stephen Morris discovered in the Soviet archives the transcript of the Soviet's surreptitiously taped debriefing by a top Vietnamese Army General to Vietnam's Politburo. The General reported that the total number of communist-held American POWs in Southeast Asia was 1,205. The debriefing was just months before Operation Homecoming. In 1973, 591 POWs were returned, at least seven hundred less than the Vietnamese had claimed. The English translation of the 1205 Document is attached to the *Clarke Decl.*, Exhibit A Bates 161-85.

735 Document. At the end of December 1970 or in early January 1971, Hoang Anh, Central Committee Secretary of the Vietnamese Workers Party, gave a wartime report on various subjects including American POWs. Anh stated in his speech before the 20th Plenary Session of the Central Committee of Vietnam that the North Vietnamese government was holding 735 American pilot POWs—now known as the “735 Document.” In 1971, Russia's intelligence directorate, the GRU, obtained Anh's speech and translated it into Russian. In 1993 the Russians provided it to the U.S. The English translation of the 735 Document is also in the record. *Id.* Bates 186-209.

NIE. Senator Bob Smith describes the genesis of the NIE:

In the spring of 1997, in relation to Senate confirmation of a U.S. Ambassador to Vietnam, the Assistant to the President for National Security Affairs, Samuel R. Berger, directed the U.S. Intelligence Community (IC) 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 from the Russian archives. Mr. Berger further directed the IC to consult with the Senate Select Committee on Intelligence (SSCI) on the terms of reference for the NIE. Mr. Berger's directives followed personal discussions with both myself and the Senate Majority Leader, Senator Trent Lott. Subsequent to Mr. Berger's pledge to have the IC conduct a special NIE, I met personally with the Director of

Central Intelligence, George Tenet, and the Director of the Defense Intelligence Agency, Lt Gen. Patrick Hughes, to underscore the importance I attached to the need for this NIE to be thorough and objective.

Smith Aff. ¶ 11.

In 1998, the DoD and the CIA issued their 33-page *National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. The NIE disparaged the reliability of the numbers provided in the 1205/735 Documents.

Critical Assessment. In November of 1998 Senator Smith, who served as Chairman of the Vietnam War Working Group of the U.S.-Russia Joint Commission on POWs and MIAs and Co-Chairman of the Senate Select Committee on POW/MIA Affairs (1991-1993), issued his 160-page *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* (hereinafter *Critical Assessment*). It supports the reliability of the 735/1205 and critiques the NIE. The *Critical Assessment* is Exhibit A to the *Clarke Aff.*

CIA Response to the Charges. In February of 2000 the DoD and CIA responded with their Joint Report, *A Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the charges Levied by A Critical Assessment of the Estimate* (hereinafter *Response to the Charges*).

B. Redactions at Issue

FOIA Request 27. In June of 2021, in the case *Moore v. CIA*, CA 20-1027 (D.D.C.), the CIA released the *Response to Charges*, unredacted. The CIA's *Vaughn* index in that case disclosed that it was withholding in full a classified version of its *Response to the Charges*. Plaintiffs' FOIA request here sought disclosure of that withheld-in-full *Response to the Charges*

II. The CIA produced it, redacted. Plaintiffs challenge certain redactions to that document, and those pages are submitted with the *Clarke Aff.* as Exhibit C.

For simplicity's sake, plaintiffs refer to the June 2021 release as *Response to the Charges I* and the December 2024 release as *Response to the Charges II*. These records are submitted as Exhibits D and E to the *Clarke Aff.*

FOIA Request 28. Plaintiffs challenge the redactions in Senator Smith's *Critical Assessment*. It is submitted as Exhibit A to the *Clarke Aff.* The challenged redactions to that document are submitted with the *Clarke Aff.* as Exhibit B.

II. ISSUE PROPERLY BEFORE THE COURT

Collateral estoppel prohibits the re-litigation of a factual or legal issue after a court has issued a final ruling on that issue. A defendant can raise *collateral estoppel* as a defense in a new lawsuit, when the plaintiff previously obtained a ruling on the same issue. The CIA asserts that *collateral estoppel* precludes the plaintiffs' claims.

A. Collateral Estoppel Inapplicable

Collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner v. Sunnen*, 333 U.S. 591, 599-60, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1948); *see also Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979).

Here, the matter raised in the second suit is not identical in all respects with that decided in the first proceeding, and the controlling facts have changed.

Defendant conflates issue preclusion, or *collateral estoppel*, with claim preclusion, or *res judicata*. Claim preclusion bars any claim or defense that could have been brought, and is not

relevant here. The CIA cites the *res judicata* case of *Orca Yachts, L.L.C. v. Mollicam, Inc.*, 287 F.3d 316, 318 (4th Cir. 2002). Defendant's Memorandum of Law, ECF No. 38 at 14 (hereinafter "*Def. Brief*"). See also defendant's discussion under its heading, *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. Id.* at 16-18.

The CIA acknowledges that Requests Nos. 27 and 28 were not made in *Moore*, and that it was required here to conduct a search for those records. In defendant's incongruous view, while the search is not barred by *collateral estoppel*, the redactions to the fruits of that search are barred.

In any event, the FOIA requests are different, the records produced are different, the parties are different, and the issue before the Court is different.

1. Different Requests

The following requests, at issue here, were not propounded in *Moore*:

Request 27

The withheld-in-full version of the CIA's February 2000 *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate*.

Request 28

The redacted portions of the November 1998 *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*, by Senator Bob Smith.

Complaint ECF No. 1 ¶ 16.

The impetus for plaintiffs' Request 27 was the CIA production of the *Review of the Charges*, and its revelation that there was another version of this record, which it withheld in its entirety.

Defendant argues that "Plaintiffs' voluntary dismissal in *Moore* has issue preclusive effect on all the overlapping requests between this case and *Moore*" (*Def. Brief* at 17), ignoring that the

requests before this Court were not made in *Moore*. In fact, in *Moore*, the CIA's production of the document was non-responsive. The CIA's *Williams Decl.* recites the subject of Request 27 was responsive to "*Moore* Request 19, which sought, 'Any records reflecting communications with Members of Congress, or Congressional oversight committees concerning the capture of American airmen during the Korean conflict who may have been transported to the Soviet Union or China and their presumed fate.'" ECF 38-1 ¶ 8. However, the subject of the *Review of the Charges* is the Vietnam War, and all of the FOIA Requests in *Moore* were regarding Korean War POWs.¹

2. Different Issues

Referring to *Review of the Charges I*, the CIA avers that "[i]n *Moore* Plaintiffs and Defendant alike moved for summary judgment based on the redactions to the Joint Report." *Def. Brief* at 14. Defendant is mistaken. There are no redactions to this document. *See Exhibit D Clarke Aff.*

The issue here is not the same as the issue before the court in *Moore*. The propriety of the redactions to *Review of the Charges II* is not an issue that has been before any court.

¹ The plaintiffs in *Moore* sought information on the Korean War:

- (a) Individual POW/MIAs (Requests 2-6, 15);
- (d) Korean and Cold War POW camps (Request 16);
- (c) Efforts to recover POWs (Request 1);
- (b) Unredacted CIA reports (Requests 2, 7-12);
- (c) Information referenced in CIA reports (Requests 3, 13-14);
- (e) Correspondence with DoD components (Request 17);
- (g) Correspondence with Congress (Request 19);
- (f) The President's Daily Brief (Request 18); and
- (h) A KGB defector (Request 20) and a Czechoslovakian general (Request 21).

3. Different Records

The records produced in this case are not the same as produced in *Moore*.

Review of the Charges I is 177 pages long. *Review of the Charges II* is 235 pages. See *Clarke Aff.* Exhibits C and D.

The CIA released *Review of the Charges I* in June 2021. This version has no redactions. The CIA released *Review of the Charges II* in December of 2024. The redactions to this record are at issue here.

In *Review of the Charges I*, the CIA released only a one-page chart for Annex F. The chart quantifies the ability of unnamed Russian officials and other sources to assess the credibility of the 1205 and 735 documents. See *Clarke Aff.* Exhibit D Bates 411.

In contrast, the *Review of the Charges II* contains an additional 13 pages, partly or wholly redacted. *Clarke Aff.* Exhibit E Bates 607-624. Of those 13 pages, six are fully redacted, six are largely redacted, and one is partially redacted. These additional, redacted pages of Annex F are completely omitted from the *Review of the Charges I*.

The *Review of the Charges I* criticizes the *Critical Assessment* for not mentioning that "the GRU sources do not support the POW-related content of the documents." *Id.* Exhibit D at Bates 347. Nothing further is added and document then immediately moves to a discussion of the "separate or second prison system." *Id.* at Bates 347. In *Review of the Charges I*, the section, *Assessment of Comments by Russian Sources on the 735 and 1205 Documents*, begins on page 77 (Bates 344). The subsection beginning on the next page, *Validity and Credibility*, ends:

The *Critical Assessment* claims that the GRU "has expressed its confidence in both the authenticity and the reliability of the information on the 1205 report." It does not mention, however, that the GRU sources do not support the POW-related content of the documents.

In *Review of the Charges II* there are an additional nine pages—redacted. *Id.* Exhibit E Bates 529-540.

4. Different Parties

Defendant writes that "[f]or those Plaintiffs who were part of both the *Moore* lawsuit and this case issue preclusion prevents them..." *Def. Brief* at 13. It implies, but does not explicitly state, that since *collateral estoppel* applies to the "overlapping" plaintiffs, it applies to all plaintiffs. Defendant names these four plaintiffs² but not the other nine individuals and a corporation who are plaintiffs here and strangers to the *Moore* case.³

Generally, *collateral estoppel* may not be asserted against one who was not a party in the first case. There is, however, an exception. Preclusion can apply so long as the party against whom *collateral estoppel* is asserted was in privity with a party in the first action or was virtually represented. Here, this circumstance is not present.

In *Favish v. Independent Counsel* 217 F.3d 1168, a case where the document sought was the very record that had been denied in a previous FOIA case, the government argued that the plaintiff was *collaterally estopped* from litigating the matter as having been virtually represented in the previous action. The Court did not agree, holding that "an abstract interest in [FOIA] enforcement was insufficient to create privity."

[T]he court asked whether Favish was collaterally estopped by having been associate counsel for Accuracy in Media, the losing plaintiff in *Accuracy in Media*, *supra*. In response, arguing for estoppel, the OIC cited decisions of this circuit where privacy leading to estoppel has been found when a party to a judgment virtually represented "a person now sought to be estopped." Virtual

² The plaintiffs in both *Moore* and in the instant action are Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter.

³ The other plaintiffs here are Thomas Michael Logan, David Logan, Megan Marx, Terri Mumley, Michael Driggs, John Zimmerlee, Carol Hrdlicka, George Paterson, and the POW Investigative Project, Inc.

representation, however, has been based on an express or implied legal relationship that makes the party accountable to the person sought to be estopped. *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 697 (9th Cir. 1984); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)... The identity of interest between Favish and Accuracy in Media is "an abstract interest in enforcement" of FOIA, an interest insufficient to create privity. *ITT Rayonier, Inc.*, 627 F.2d at 1003. *Collateral estoppel* does not apply.

B. Plaintiffs' Issues Not Contrary to the Court's Admonition

The CIA argues that "[c]onsistent 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." *Def. Brief* at 15.

As set forth above, the records at issue in this case were neither provided nor sought in the previous case. Plaintiffs' prayer for relief here does not run afoul of the Court's direction that "[y]ou don't get two bites at the apple." Contrary to defendant's view, the withholdings at issue do not constitute a "second opportunity to revisit this [same] issue." *Id.* at 15.

The CIA's view that plaintiffs seek to advance already litigated issues is unfounded. Plaintiffs avoid litigating any redundant issues, or unnecessarily burden the parties or the Court. Count III of plaintiffs' Complaint is *Improper Withholding of Operational Files*. ECF No. 1 ¶¶ 25-31. Under that count, plaintiffs attached to their Complaint two affidavits, one of a fact witness and the other an expert, "based upon personal knowledge or otherwise admissible evidence" under 50 U.S.C. § 3141(f)(3), opining that continued placement in repositories of operational files is improper.⁴ The Court denied plaintiffs' prayer that the CIA be ordered to

⁴ Complaint ECF No. 1 at 11:

27. 50 U.S.C. § 3141(f)(3) states that "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."

28. Attached hereto as Exhibit B is the Affidavit of the former Vice-Chairman of the

search its operational files. *Mem. Op.* ECF No. 25 at 11. Regarding the information that had been sought in *Moore*, in lieu of submitting the same declarations regarding its searches of non-operational records, defendant chose to redo its search.⁵ Plaintiffs do not complain about the CIA's procedure, particularly since it yielded another 130 separate records totaling 1,578 pages. Plaintiffs recount this procedural history in response to defendant's claim that plaintiffs seek to duplicate issues litigated in *Moore*. They do not.

Here, plaintiffs challenge only a small fraction of defendant's redactions, and do not challenge the CIA's search. In an effort to avoid litigating even this narrow issue, plaintiffs

Senate Select Committee on POW/MIA Affairs, 1989 to 1993, Senator Bob Smith. Mr. Smith wrote that he "personally [has] seen hundreds of classified documents that could and should be released as they pose no national security risk."

- 29: Attached hereto as Exhibit C is the Affidavit of former CIA official Kevin Shipp, whose expertise includes classification authority. Mr. Shipp wrote that "[d]ocuments relating to the fate of POWs, including those transferred to Russia or China, can clearly be released, at least in part, without revealing the identity of any confidential source." Release would "cause no harm to international relations or ongoing diplomatic activities. Given the age of these records, there is no longer any justification for continuing to treat them as 'operational records' under 50 U.S.C. § 3141."

⁵ See transcript March 13, 2024 proceedings at 3-4, government response to Court, "How much stuff is left, and can you get that done in a couple of months?"

- A. So, the answer to that is no, and let me try to explain why. The case in D.C. was about a former FOIA request that looked a lot like this one but is not identical. There is, as Mr. Clarke said, a great deal of overlap. But once that FOIA request was completed and that civil action dismissed and these plaintiffs submitted a new FOIA request to the CIA, the CIA had to start all over again in producing records. That is, unfortunately, the way FOIA works. And so, it needs to do the exact same process again in order to fulfill its FOIA obligation. And so, as a result, there are issues that were not litigated in D.C., but could have been but for plaintiff's choice to voluntarily dismiss that litigation, that the plaintiffs now want to litigate in this court, for whatever reason.

asked defendant, by counsel, the reason that the CIA redacted Russians' knowledge of unrepatriated Vietnam War POWs (a question that has yet to be answered).

Moreover, plaintiffs apprised the government of their position well before it undertook to brief the matter. While the undersigned inadvertently neglected to inform defendant that plaintiffs also challenge the redactions to Senator Smith's *Critical Assessment*, Request 28, the redacted information appears to be the same in both documents and the exemptions claimed are the same in both documents. Thus, defendant need address the *Critical Assessment* redactions only briefly, if at all.

III. BAD FAITH

Agency bad faith in the litigation is relevant because it undermines the credibility of the agency's statements in its affidavits. *Allen v. CIA*, 636 F.2d 1287 (D.C.Cir. 1980). Bad faith can be in the agency's conduct in the litigation, or bad faith in the activities that generated the records at issue. “[W]here it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency... government affidavits lose credibility.” *Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534 (6th Cir. 2001). An agency's declaration explaining its withholdings is sufficient to support a claimed exemption if there is no evidence in the record of agency bad faith, *Shaw v. U.S. Dep't of State*, 559 F.Supp. 1053, 1056 (D. D.C. 1983).

Plaintiffs submit evidence that the CIA's NIE was written in bad faith. Thus, plaintiffs have good cause to believe that the CIA redacted information because it corroborates the numbers appearing in the 1205/735 Documents.

Plaintiffs aver that the CIA's nondisclosure violates Executive Order ("E.O.") 13,526:

Sec. 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.

A. National Intelligence Estimate

Plaintiffs allege bad faith in the activities that generated the records at issue.

Plaintiffs aver that Senator Bob Smith's 160-page *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* (hereinafter "*Critical Assessment*"), proves bad faith.

Senator Smith's Executive Summary states that the NIE is "replete with inaccurate and misleading statements, and lacks a reasonably thorough and objective analytical foundation." *Clarke Aff.* Ex A Bates 7. The Senator substantiates his thesis under the heading, *Detailed Assessment of NIE Statements*. It quotes 40 passages from the NIE.

The *Critical Assessment* cites evidence undermining each of the 40 passages. *See generally Clarke Aff.* ¶¶ 9-38. The NIE misrepresents, and omits, evidence corroborating the 1205/735 numbers. *Id.* ¶¶ 17-22. The NIE falsely portrays Vietnamese cooperation as excellent. *Id.* ¶¶ 23-35. It unjustifiably impugns the credibility of sources. *Id.* ¶ 31. It ignores, and omits, evidence of POW transfers to the USSR. *Id.* ¶¶ 32-34. It misrepresents, and omits, evidence of second prison system. *Id.* ¶¶ 35-36. It misrepresents, and omits, corroborative accounts by Russian sources. *Id.* ¶¶ 37-44.

The NIE disparages the genuineness of the documents, neglecting to reveal that numerous intelligence reports attest to their authenticity. *Id.* ¶ 26. It posits that the date is wrong,

and the length is wrong. *Id.* ¶¶ 27-28. And it even questions whether there ever existed a transcript in the Vietnamese language. *Id.* ¶¶ 29-30.

See also Smith Aff. ¶ 14, "The NIE was extremely inaccurate, misleading, speculative and unsupported. It ignored that virtually all other detailed statements in the 1205 were known to be true. Yet the IC singled out only the statements about the 1,205 POWs as being false."

While the CIA's *Response to the Charges* seeks to defend the NIE, the NIE is indefensible.

B. Redactions of Accounts of Russian Officials

Senator Smith's *Critical Assessment* discusses information provided by Russians, but omitted from the NIE, at length.⁶

⁶ *See, e.g., Clarke Aff.* Exhibit A at Bates 36: 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—

- In September 1996, the Russian Chairman of the U.S.-Russia POW/MIA Commission, General-Major Vladimir Zolotarev, stated "*We consider the number of American POWs given in that report quite plausible.*"
- In August, 1995, the Chief State Archivist of the Russian Federation, Dr. Rudolf Pikhoya, stated, "*I am absolutely certain that the numbers cited in the 1205 report are true. I believe that data still exists in Vietnam which deals specifically with US POWs.*"
- Also, in August 1995, Captain 1st Rank Alexander Sivets of the Main Intelligence Directorate (GRU) of the General Staff of the Russian Federation stated "*We consider that the Vietnamese leaders, in their desire to exploit the POW problem for their own interests, would publicly cite a lower figure than the real one. This is something that we do not doubt...we believe there were more American POWs than Vietnam was publicly admitting to*" as the 1205/735 documents claim.
- In a conversation with Gen. Vessey on June 22, 1993, Russian General Volkogonov stated "*the Vietnamese would naturally not keep those prisoners the US knew were in captivity,*" thus lending credibility to the fact that, with the exception of 16 individuals, all POWs captured during the Vietnam War prior to the date of the 1205 report, were, in fact, known to be POWs and so listed by the Pentagon prior to their release.

1. Response to the Charges II

In its *Vaughn* index in *Moore* the CIA wrote, "This document is withheld in full because CIA determined that the ability to see where the classified, redacted sections were located in the report is sensitive information."⁷ That concern was well-founded. The location of the classified, redacted sections demonstrates that most of the withheld information concerns what the Russians had to say about the reliability of the numbers stated in the 1205/735 Documents.

Id. at Bates 65-66: In this section, quoted above, the NIE lists [redacted] Russians as having commented on the authenticity of the 1205 document since 1993, and there is no caveat that these are *only* examples, as was done elsewhere on different subjects in other portions of the NIE. 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).

Id. at 68-71: NIE not mention the relevant testimony on this specific subject by... former USSR Central Committee Secretary... told US officials during my visit to Moscow in July, 1997 that the GRU had "good channels and connections" and he had no reason to doubt that the 1205 document was not what it purports to be.

See also Clarke Aff., Evidence of Russian corroboration misrepresented and omitted ¶¶ 32-38, notes 39-44.

⁷ *Williams Decl.* ECF. No. 38-1 Exhibit J, *Vaughn* index in *Moore*:

This document consists of the classified version of the joint Department of Defense and CIA report on POW/MIA issues (unclassified version released in full as C00500205). Exemptions (b)(1) and (b)(3) (National Security Act) applies to certain material that is classified under 1.4(c) of E.O. 13526 and reflects intelligence activities or intelligence sources and methods (intelligence activities). This document is withheld in full because CIA determined that the ability to see where the classified, redacted sections were located in the report is sensitive information. This document is classified as SECRET, and as such, disclosure of this information could be reasonably expected to result in damage to national security.

In *Review of the Charges I*, the section, *Assessment of Comments by Russian Sources on the 735 and 1205 Documents*, begins on page 77 (Bates 344). The subsection beginning on the next page, *Validity and Credibility*, ends:

The *Critical Assessment* claims that the GRU "has expressed its confidence in both the authenticity and the reliability of the information on the 1205 report." It does not mention, however, that the GRU sources do not support the POW-related content of the documents.

In *Review of the Charges II* there are an additional nine pages—redacted. *Id.* Exhibit E Bates 529-537.

2. Critical Assessment

Senator Smith's *Critical Assessment* also contains redactions in areas pertaining to information provided by Russian sources. Responding to the NIE statement, "Vietnamese officials continue to claim the report is a fabrication," Senator Smith writes, "the NIE merely states Hanoi's position with respect to the Russian documents, and in doing so, states it in an inaccurate and incomplete manner, as shown below." The next page is mostly redacted, followed by a wholly redacted page, follow by another mostly redacted page. *Clarke Aff.* Exhibit A Bates 71-74, Exhibit C Bates 212-214. Another redaction appears to what Russian Presidential Advisor and Co-Chairman of the Joint U.S.-Russia Commission on POW /MIAs, General Volkogonov, had said. *Id.* Bates 143.

Three of the NIE statements—and Senator Smith's response—are completely redacted. *Id.* Bates 216-225.

IV. CIA FAILS TO MEET ITS BURDEN TO SHOW REDACTED INFORMATION EXEMPT FROM DISCLOSURE

Plaintiffs have good cause to believe that most of the information withheld concerns Russian accounts of the reliability of the numbers in the 1205/735 Documents.

In sum, the CIA asserts that the withheld information concerns the priority of intelligence activities and targets, or methods of collection, or locations, its release could significantly impair its ability to carry out its core missions, or could allow targets to take measures to hide their activities from the CIA, or to target Agency officers.

The claims are conclusory, and merely recite statutory standards. *See* Declaration of Mary Williams ECF No. 38-1 (*Williams Decl.*).

Absent from the *Williams Decl.* is any explanation of how disclosure of Russian accounts on the reliability of the 1205/735 Documents could have an adverse effect on national security or foreign policy or reveal any methods or sources. The CIA is required to explain how the redactions fall within the exemptions. It has not done so.

Perhaps the CIA posits that a detailed justification for the its withholding is not possible without revealing the very information sought to be protected. If so, it could seek leave to file its declaration *in camera*. *See., e.g., Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980), where the CIA argued "that to require greater specificity in its affidavits would result in disclosure of the information sought to be protected," and concluding that "[t]he only way to escape this dilemma involves use of *in camera* inspection."

Nor does the government discuss the age of these records. The standard for withholding is, in part, a function of the age of the document.

The Secretary of the Vietnamese Workers Party Secretary reported that 735 American pilot POWs being held by the North Vietnamese in 1971, 54 years ago. The speech to Vietnam's Politburo reporting 1,205 POWs was delivered in 1972, 53 years ago. In 1973, 52 years ago, the Paris Peace Accords were signed and President Nixon announced that "all of our American

POWs are on the way home." The CIA wrote the NIE in 1998, 27 years ago. Senator Smith responded with his *Critical Assessment* in 1998, also 27 years ago.

The CIA wrote the *Response to the Charges* in 2000, 25 years ago, when it released a sanitized version. It released the entire 25-year-old *Response to the Charges II*, redacted, in December of 2024, in this action.

The CIA's entire discussion of the age of the redacted material is that the information "remains classified" "despite the age of the report."

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.

Def. Brief at 9.

The CIA violates not only the E.O. 13,526 provision limiting classification (§ 1.7, *Classification Prohibitions and Limitations* ("continue to be maintained as classified... to prevent embarrassment")), but its conduct is also contrary to § 3.3, *Automatic Declassification*, which mandates disclosure of 25-year-old records in the absence of an applicable FOIA exemption.⁸ Defendant's nondisclosure also violates the 1992 E.O. 12812, *Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action*,⁹ as well as the 1993

⁸ 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...

⁹ E.O. 12812, July 22, 1992, reciting that the Senate had by Resolution asked for an

Presidential Directive ordering the government to comply with that E.O., *Presidential Decision Directive/NSC 8, Declassification of POW/MIA Records*.¹⁰

Defendants rely on Exemptions (b)(1) and (b)(3). The FOIA directs trial courts to conduct *de novo* review of the applicability of the particular exemptions cited by the agency to the withheld matters. 5 U.S.C. § 552(a)(4)(B).

Exemption (b)(1). 5 U.S.C. § 552(b)(1) permits nondisclosure of records that are:

- (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.

Defendant cites Executive Order 13,526 and posits that the information is properly classified as declassification would (1) reveal intelligence activities, sources or methods, to the detriment of national security ("reasonably could be expected to result in damage"), or (2) "clearly and demonstrably" be expected to reveal the identity of a human source, or (3) cause serious harm to relations between the United States and a foreign government.

"Executive order requiring all executive branch departments and agencies to declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POWs and MIAs," with the exception of where (1) "release of classified material could jeopardize continuing United States Government efforts to achieve the fullest possible accounting of Vietnam-era POWs and MIAs," or (2) release could constitute a clearly unwarranted invasion of personal privacy of returnees, family members of POWs and MIAs or (3) release "would impair the deliberative processes of the executive branch."

¹⁰ PPD-8, June 10, 1993:

In accordance with my Memorial Day Announcement of May 31, 1993, all executive agencies and departments are directed to complete by Veterans Day, November 11, 1993, their review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812.

Exemption (b)(3). 5 U.S.C. § 552(b)(3) permits nondisclosure of records that are specifically exempted from disclosure by statute if that 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. The CIA states that Exemption 3 redactions are appropriate as two statutes preclude the disclosure; 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."

In cases involving national security equities, such as this one, there is generally significant overlap between the information covered by Exemption 1 and that covered by Exemption 3. *See Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (citing *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976)). Here, the CIA asserts both Exemptions.

The *Williams Decl.* relates that the affiant reviewed the redacted portions of the *Response to the Charges II. Def. Brief* at 26-27. She judged that the "information must be kept secret in the interest of national defense or foreign policy." The information pertains to "intelligence activities (including covert action), [or] intelligence sources or methods" and "foreign relations or foreign activities of the United States." *Id.* at 29-30.

Again, absent from the *Williams Decl.* is any connection between what the Russians said about the veracity of the 1205/735 numbers and national security.

Moreover, it does not appear that the U.S. intelligence officials were concerned with public disclosure upon its receipt of the information. *See, e.g.* Affidavit of Norman D. Kass, former Executive Secretary of the *U.S.–Russia Joint Commission on POWs/MIAs*, relaying that no "Russian Intelligence official or American Intelligence or other official expressed any concerns or reservations to me or to the USRJC about the public release of any information

provided by the Russians." *Kass Aff.* ¶ 7. Perhaps the CIA's recalcitrance in disclosure materialized only upon the issuance of the NIE.

FOIA does not require explanations "rich with detail or lavish with compromising revelations," but some specificity is necessary. *Animal Legal Defense Fund, Inc. v. Dep't of Air Force*, 44 F.Supp.2d 295, 302 (D.D.C.1999). An agency's declaration explaining its withholdings is sufficient to support a claimed exemption if it... describes the justification for withholding the requested records "in sufficient detail to demonstrate that the claimed exemption applies," *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392 (D.C.Cir. 1987). Here, the CIA repeats the law, but does not state how it applies to the facts.

While the CIA claims that its withholdings are made in good faith, Senator Smith's account is to the contrary; he "personally ha[s] seen hundreds of classified documents that could and should be released as they pose no national security risk. What is really at risk are the reputations and careers of the intelligence officials who participated in and perpetrated this sorry chapter in American history." *Smith Aff.* ¶ 8.

WHEREFORE, for the forgoing reasons, plaintiffs pray that the Court deny defendant's motion for summary judgment and order disclosure, or, alternatively, order defendant to submit the redacted material to the Court for its inspection *in camera*.

PLAINTIFFS STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure, and Local Civil Rule 56(B), Plaintiffs submit this Statement of Material Facts Not in Genuine Dispute.

1. The following requests, at issue here, were not propounded in *Moore*:

Request 27

The withheld-in-full version of the CIA's February 2000 *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate*.

Request 28

The redacted portions of the November 1998 *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*, by Senator Bob Smith. Complaint ECF No. 1 ¶ 16.

2. The subject of the CIA's February 2000 *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate*, released June 25, 2021 ("*Review of the Charges I*") is the Vietnam War and was not responsive to any request in previous litigation, including "*Moore* Request 19, which sought, 'Any records reflecting communications with Members of Congress, or Congressional oversight committees concerning the capture of American airmen during the Korean conflict who may have been transported to the Soviet Union or China and their presumed fate.'" *Williams Decl.* ECF 38-1 ¶ 8.

3. There are no redactions to *Review of the Charges I*. Exhibit D *Clarke Aff.* "In *Moore* Plaintiffs and Defendant alike [did not] move for summary judgment based on the redactions to the Joint Report." *Def. Brief* at 14.

4. *Review of the Charges I* is 177 pages long, whereas *Review of the Charges II* is 235 pages. *Clarke Aff.* Exhibits C and D.

5. In *Review of the Charges I*, the CIA released only a one-page chart for Annex F. The chart quantifies the ability of unnamed Russian officials to assess the credibility of the 1205

and 735 documents. *Clarke Aff.* Exhibit D Bates 411. Annex F in *Review of the Charges II* contains an additional 13 pages, mostly redacted. *Clarke Aff.* Exhibit E Bates 607-624.

6. In *Review of the Charges I*, the section, *Assessment of Comments by Russian Sources on the 735 and 1205 Documents*, begins on page 77 (Bates 344). The subsection beginning on the next page, *Validity and Credibility*, ends:

The *Critical Assessment* claims that the GRU "has expressed its confidence in both the authenticity and the reliability of the information on the 1205 report." It does not mention, however, that the GRU sources do not support the POW-related content of the documents.

7. In *Review of the Charges II* there are an additional nine pages—redacted. *Id.* Exhibit E Bates 529-540.

8. The plaintiffs who are strangers to Moore are Thomas Michael Logan, David Logan, Megan Marx, Terri Mumley, Michael Driggs, John Zimmerlee, Carol Hrdlicka, George Paterson, and the POW Investigative Project, Inc. *Def. Brief* names Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter.

9. Redactions to the *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* (hereinafter "*Critical Assessment*") states that "the NIE merely states Hanoi's position with respect to the Russian documents, and in doing so, states it in inaccurate and incomplete manner, as shown below," and the next three pages are mostly redacted. *Clarke Aff.* Exhibit A Bates 71-74, Exhibit C Bates 212-214.

10. Three of the NIE statements as well as Senator Smith's response are completely redacted. *Id.* Bates 216-225.

11. A redaction appears to what Russian Presidential Advisor and Co-Chairman of the Joint U.S.-Russia Commission on POW /MIAs, General Volkogonov, had said. *Id.* Bates 143.

12. Absent from the *Williams Decl.* is any explanation of how disclosure of Russian accounts on the reliability of the 1205/735 Documents could have an adverse effect on national security or foreign policy or reveal any methods or sources.

**PLAINTIFFS' RESPONSE TO DEFENDANT'S
STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

Pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure, and Local Civil Rule 56(B), Plaintiffs respond to Defendant's Statement of Material Facts Not in Genuine Dispute, ECF No. 38 at 3-11.

Plaintiffs dispute the following statements.

CIA Statement

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

Plaintiffs' response

Most of plaintiffs' FOIA request sought individual records, not "28 general sets of records."

CIA Statement

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.

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that the information redacted in the Joint Report is not properly classified and does not meet the criteria for protection under Executive Order 13,526 as the information need not be kept secret in the interest of national defense or foreign policy.

CIA Statement

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.

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that the redacted information does not pertain to intelligence activities or intelligence sources or methods or foreign relations.

CIA Statement

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

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that disclosure could not reasonably be expected to result in damage to national security.

CIA Statement

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.

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that the redactions are made to conceal the veracity of the numbers in the 1205/735 Documents, in violation of Executive Order 13,526, and that the information does not require protection in the interests of national security.

CIA Statement

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.

Plaintiffs' Response

The information sought was not provided on the understanding that any relationship will remain secret.

And these are opinions, not statements of fact. Plaintiffs opine that the withheld information does not concern the priority of intelligence activities and targets, or methods of collection, or locations, and its release could not significantly impair the CIA’s ability to carry out its core missions or make it more difficult for the CIA to collect and analyze foreign intelligence. Nor could release allow targets to take measures to hide their activities from the CIA or target Agency officers.

CIA Statement

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.

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that disclosure would not harm the United States national security or foreign relations.

CIA Statement

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.

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that neither the CIA Act or the National Security Act 50 U.S.C. § 3024(i)(1) protects the withheld information.

CIA Statement

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 ¶

Plaintiffs' Response

This is an opinion, not a statement of fact. Plaintiffs opine that the information does not reveal priority of intelligence activities and targets or methods of collection or confidential human sources.

CIA Statement

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.

Plaintiffs' Response

The CIA's determination was incorrect.

DATE: May 21, 2025.

Respectfully submitted,

/ s/ John H Clarke
John H. Clarke (VSB No. 023842)
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
john@johnhclarkelaw.com
Counsel for Plaintiffs