

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 MOTION FOR *IN CAMERA* INSPECTION

Plaintiffs respectfully submit this memorandum in support of their prayer that the Court order the Defendant to submit the redacted pages at issue for the Court's *in camera* review.

In conducting its *de novo* review, a trial court should first offer the agency the opportunity to demonstrate, through detailed affidavits, that the withheld information is clearly exempt and contains no segregable, nonexempt portions. *See EPA v. Mink, supra*, 410 U.S. at 73, 93 S.Ct. at 829. When the Agency fails to meet that burden, not an uncommon event, the Court may employ procedures that will provide it with sufficient information to make its determination, including *in camera* inspection.

The court in *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980) laid down guidelines for *in camera* inspection of records. It listed these six factors for a district court to consider: (1) judicial economy, (2) the conclusory nature of the agency's affidavits; (3) bad faith on the part of the agency; (4) disputes concerning the contents of the document; (5) the agency proposes *in camera* inspection; and (6) strong public interest in disclosure. Here, five of the six factors are present.

The *Allen* court reversed the district court's summary judgment ruling, holding that the district court must conduct an inspection *in camera* of the 15-page document that the CIA had withheld under Exemptions 1 and 3—the same Exemptions that the CIA asserts here.

(1) Dispute Concerning the Contents of the Document

Plaintiffs have demonstrated good cause to question defendant's explanation for its redactions to Senator Smith's critique of the NIE, as well as the redactions to its retort—*A Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate ("Review of the Charges II")*.

The CIA asserts that Exemption 1 permits the withholding because an Executive Order authorizes the CIA to keep the information secret and it is "in fact properly classified pursuant to such Executive order." Defendant also posits that Exemption 3 permits nondisclosure as the information is "specifically exempted from disclosure by statute."

Plaintiffs believe that the redacted information is neither properly classified nor exempted from disclosure by statute, but rather is withheld because the redacted information further undermines the NIE's thesis—that the numbers provided in the 1205/735 Documents are unreliable.

"After decades of FOIA requests, emotional appeals from family members, senators and congressmen, and House and Senate Committee investigations, the intelligence agencies still keep numerous documents classified under the guise of national security." *Smith Aff.* ¶ 19.

In camera inspection would resolve the competing assertions made by both sides.

(2) Judicial Economy

Plaintiffs challenge redactions appearing on 21 pages of the CIA's February 2000 *Review of the Charges II. Clarke Aff.* Exhibit C Bates 230-238 and 240-253.

The challenged redactions to 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 ("*Critical Assessment*"), appears on 13 pages. *Id.* Exhibit B Bates 212-253.

An examination of the redactions would typically involve less time than would be expended to be necessary in presentation and evaluation of further evidence, as in *Allen*:

Where the examination of the requested documents requires herculean labors because of their volume the reluctance to conduct such inspection is understandable. But when the requested documents are few in number and of short length, such reluctance frequently exacts a cost from the parties and the courts in time and money. An examination of the documents themselves in those instances will typically involve far less time than would be expended in presentation and evaluation of further evidence.

Id. at 1298.

(3) Strong Public Interest in Disclosure

"In cases that involve a strong public interest in disclosure there is also a greater call for *in camera* inspection." *Id.* at 1299.

This lawsuit is part of a much larger advocacy, spanning 50 years, by family members, journalists, authors, organizations, Congressional Committees, at least three Administrations, and an Act of Congress—all seeking to prompt the government to reveal what it knows of the fates of unrepatriated American POWs from the Vietnam War. Calls for public disclosure of information on these unrepatriated POWs has been ongoing for decades.

The 1205 Document is regarded as the most illuminating record on the issue of the number of POWs remaining in communist hands at war's end. *See, e.g., Smith Aff.* ¶ 10, "One of the most intriguing documents on the issue is the one called the '1205 Document,' or the '1205.'"¹

(4) Bad Faith

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). "Where there is evidence of bad faith on the part of the agency, the representations of the agency lose all trustworthiness. *In camera* inspection in such situations is 'plainly necessary unless it is clear to the court that the withholding by the agency would not even be sustainable after *in camera* inspection.'" *Id.* at 1299.

Bad faith can be in the agency's conduct in the litigation, or bad faith in the activities that generated the records at issue. *Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534 (6th Cir. 2001). Plaintiffs allege bad faith in the activities that generated the records at issue and that Senator Bob Smith's 160-page *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.* Exhibit 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

¹ Senator Smith's affidavit initially filed Aug. 2016 in *Hall v. CIA*, USDC DC CA 04-814 ECF No. 258-4.

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 a 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."

The *Allen* court observed that the need for *in camera* inspection is heightened when an agency acts improperly:

When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency's withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater.

Id. at 1299.

(2) Conclusory Nature of the Agency Affidavit

The CIA's claims are conclusory, and merely recite statutory standards. *See Declaration of Mary Williams ECF No. 38-1 (Williams Decl.)*. The *Williams Decl.* relates that the "information must be kept secret in the interest of national defense or foreign policy," and that

the information pertains to “intelligence activities or intelligence sources or methods” and “foreign relations or foreign activities of the United States.” *Id.* at 29-30.

The *Allen* court held that simply reciting statutory standards are insufficient:

The affidavit's reliance on such expansive phrases as "intelligence sources and methods," "sequence of events," and "process" falls far short of providing the "reasonable specificity" that this court has held is required for summary judgment without in camera inspection.

* * *

The CIA's affidavits do little more than parrot the language of Section 403(d)(3) by stating that "intelligence sources and methods" will be compromised if the document is disclosed

Id. at 1292.

The CIA repeats the law, but does not state how it applies to the facts. This factor too weighs in favor of *in camera* inspection.

Conclusion

In view of these considerations, the Court should order *in camera* inspection of selected redactions of:

- A. 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, Exhibit B Bates 212-253; and
- B. 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 December 3, 2024 Exhibit C Bates 230-238 and 240-253.

DATE: May 21, 2025.

Respectfully submitted,

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