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 COMBINED REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant, through its undersigned counsel, respectfully submits this combined reply memorandum of law in support of its motion for summary and in opposition to Plaintiffs' motion for summary judgment.

INTRODUCTION

Summary judgment should be granted to the Central Intelligence Agency ("CIA") in this Freedom of Information Act ("FOIA") action involving requests for records concerning prisoners of war in the Korean and Vietnam wars. Plaintiffs' opposition confirms that that they do not challenge the adequacy of the CIA's search. Accordingly, all that remains in this action is for the Court to resolve whether the CIA properly redacted identified pages of one record—the Joint Report—pursuant to FOIA Exemptions 1 and 3.

And on that singular issue, Plaintiffs' opposition also confirms that there are no genuine issues of material fact and that the CIA is entitled to judgment as a matter of law. Of course, the Court does not need to reach the merits of that issue as Plaintiffs have raised an issue that was fully and fairly litigated before Judge Lamberth in *Moore v. CIA*, 1:20-cv-1207 (D.D.C.). Either the

doctrine of collateral estoppel or this Court's general admonition to the parties that it would not revisit matters addressed in *Moore* preclude consideration of this challenge. Indeed, Judge Lamberth previously held that the CIA properly withheld the Joint Report under FOIA Exemptions 1 and 3.

Even if this Court elects to revisit the merits of that issue here, Plaintiffs failed to establish that CIA did not properly redact the Joint Report pursuant to FOIA Exemptions 1 and 3. As to FOIA Exemption 1, despite Plaintiffs' claims to the contrary, there is no bad faith, the age of the record has no bearing on its classification status, and the CIA did not violate the host of Executive Orders Plaintiffs cite. Rather, and consistent with Executive Order 13,526, the CIA redacted this information in the identified pages of the Joint Report to safeguard intelligence activities, intelligence methods, and classified relationships. Were that information to be disclosed, it would cause serious damage to the United States' national security. Thus, in matters where courts must defer to the agency's national security experts, the CIA properly invoked FOIA Exemption 1. As to FOIA Exemption 3, the Central Intelligence Agency Act and National Security Act preclude disclosure of the general categories of information that the CIA safeguarded from disclosure. Plaintiffs make no argument to the contrary; instead, they impermissibly focus their attention on the record's specific contents, which courts have routinely held is not proper for analyzing FOIA Exemption 3.

Lastly, the Court should reject Plaintiffs' eleventh-hour challenge to the redactions made to the *Critical Assessment*. This challenge has been forfeited, as Plaintiffs previously represented to the Court that they were only challenging the redactions to one record (*i.e.*, the Joint Report). This newfound challenge also has no merit because, like the Joint Report, redactions were made pursuant to FOIA Exemption 1 and 3. Those redactions safeguard information that if disclosed,

would cause serious harm to national security, and like the Joint Report, the information protected by the redactions is prohibited from disclosure by two statutes. Moreover, some of the redacted information in the *Critical Assessment* is protected under FOIA Exemption 6 to safeguard the identifying information of government employees and other third-party individuals.

Thus, the Court should grant the CIA's motion for summary judgment and deny Plaintiffs' motion for summary judgment.

ALL MATERIAL FACTS ARE UNDISPUTED

As an initial matter, Plaintiffs have not specifically responded to numerous facts in the CIA's Statement of Undisputed Material Facts ("Def. SUMF"). *See* Dkt. No. 42 ("Opp.") at 23-27 (responding only to ¶¶ 1, 29-35, 37, 40). Pursuant to Local Civil Rule 56(B), Plaintiffs have therefore conceded all facts not specifically addressed—*i.e.*, those contained within ¶¶ 2-28, 36, 38-29. In so conceding these facts, Plaintiffs have yielded significant ground to the CIA on the collateral estoppel issue and the redactions challenge. First, in failing to address ¶¶ 27-28, Plaintiffs concede that, "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," and in this case, "CIA released the Joint Report in part, making redactions pursuant to FOIA Exemptions 1 and 3." Def. SUMF ¶ 28. This confirms that the same information withheld in *Moore*, and the same legal justifications provided for that withholding in *Moore*, are at issue in this case. Second, Plaintiffs concede that they "only challenge to the withholding decisions (e.g., redactions) of the CIA here concerns this Joint Report." Def. SUMF ¶ 28. Undoubtedly, given this admission, there is no basis for Plaintiffs to enlarge the issues in this case with another redactions challenge to a second record—the *Critical Assessment*—that Plaintiffs maintain was "inadvertently neglected." Opp. at 11. Third, through their silence Plaintiffs confirm that CIA's declarant, Mary Williams, has the requisite credentials

to conclude whether the redacted information in the Joint Report is properly classified pursuant to Executive Order 13,526. *See* Def. SUMF ¶ 27.

Save Plaintiffs' semantics challenge to Def. SUMF ¶ 1, the remainder of Plaintiffs' "disputes" to the CIA's proffered facts concerning the Joint Report's redactions are hardly disputes at all. *See generally* Opp. at 23-27. They are repeated assertions that the CIA provided "an opinion, not a statement of fact" regarding the national security harms that would flow from disclosure. *See, e.g.*, Opp. at 24 (response to Def. SUMF ¶ 30). Those conclusory contentions do not create fact disputes—especially when Plaintiffs adduced no evidence to contradict the CIA's proffered facts as required by the Local Rules. *See* Loc. Civ. R. 56(B); *Tankesley v. Vidal*, 2023 WL 4273763, at *9-10 & n.26 (E.D. Va. June 29, 2023). Moreover, Plaintiffs' efforts to suggest that these opinions hold less evidentiary weight fall flat and ignore binding precedent. As the Fourth Circuit has repeatedly stressed, "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts." *Bowers v. U.S. Dep't of Just.*, 930 F.2d 350, 357 (4th Cir. 1991); *accord Simmons v. U.S. Dep't of Just.*, 796 F.2d 709, 711 (4th Cir. 1986) ("In 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."). All told, the CIA's bases for redacting the challenged pages of the Joint Report stand undisputed.

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 56(B), Defendant provides the following response to Plaintiffs' statement of undisputed facts.

¶ 1: Admitted.

¶ 2: Disputed. The Joint Report/*Review of the Charges II* was identified in *Moore* as a responsive record and was withheld in full. Def. SUMF ¶ 27 (conceded by Plaintiffs); DEX 1 ¶ 8.

¶ 3: Defendant admits that the document Plaintiffs attached as "Exhibit D" (Dkt. No. 41-2 at 284 through Dkt. No. 41-3 at 156) contains no redactions. Defendant disputes the second sentence. As Plaintiffs concede through their silence (Def. SUMF ¶ 28) *Moore* and this case involve the same Joint Report/*Review of the Charges II*, and the parties in *Moore* litigated whether the same withheld information was exempted from disclosure under FOIA Exemptions 1 and 3.

¶ 4: Disputed. *Review of the Charges I* is 169 pages long, *see* Exhibit D (Dkt. 41-2 at 284 through 41-3 at 156), and *Review of the Charges II* is 211 pages long, *see* Exhibit E (Dkt. 41-4 at 157 through Dkt. 41-5 at 68).[1]

¶ 5: Disputed in part. Defendant admits that *Review of the Charges I* has an Annex F, which is 1 page (Dkt. 41-3 at 138) and that *Review of the Charges II* has an Annex F, which is 14 pages long (Dkt. 41-5 at 31 to 44).

¶ 6: Disputed in Part. The section entitled "Assessment of Comments by Russian Sources on the 735 and 1205 Documents" in *Review of the Charges I* appears on page 75, *not* 77 (Dkt. 41-3 at 71). Plaintiffs accurately quoted the passage found in Dkt. 41-3 at page 74.

¶ 7: Admitted.

¶ 8. To the extent Plaintiffs are proffering that Plaintiffs Thomas Michael Logan, David Logan, Megan Marx, Terri Mumley, Michael Driggs, John Zimmerlee, Carol Hrdlicka, George Patterson, and the POW Investigative Project, Inc. were *not* parties in *Moore v. CIA*, 1:20-cv-1027 (D.D.C.), Defendant admits this fact.

[1] Though Plaintiffs cite Exhibits C and D for these propositions, Exhibit C is not labeled as *Review of the Charges I. See* Dkt. 41-2 at 252.

¶ 9: Defendant admits that Plaintiffs accurately quoted the passage and that three pages with redactions follow, *see* Dkt. 42-2 at 94-97.[2] Given that there is no objective measure to determine whether a page is "mostly redacted," Pls. SUMF ¶ 9, Defendant is unable to admit or dispute that fact.

¶ 10: Plaintiffs cited evidence does not provide support for the assertion that Senator Smith's statements were in the redactions. Indeed, because the text is redacted, the author of those comments cannot be identified. Defendants otherwise admit that redaction boxes were made three times next to the phrase: "NIE Statement." Dkt. 41-2 at 242, 244, and 250.

¶ 11: Plaintiffs cited evidence that does not provide support for the statement that General Volkogonov's statements were at issue in the redactions. Indeed, because the text is redacted, the author of those comments cannot be identified. *See* Dkt. 41-2 at 166.

¶ 12: Disputed. The Williams Declaration provides a full accounting of why the information redacted in the Joint Report/*Review of the Charges II* involves matters of national security and Plaintiffs identify no legal authority to justify the requested granularity of detail. *See* DEX 1, ¶¶ 13-20.

ARGUMENT

I. PLAINTIFFS ARE RELITIGATING THE SAME ISSUES PREVIOUSLY ADDRESSED IN *MOORE v. CIA* AND ARE PRECLUDED FROM DOING SO

Plaintiffs cannot pursue their claim to challenge the CIA's redactions to 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/*Review of*

[2] Contrary to Plaintiffs' representation, there are no bates numbers labeled on their "Exhibit C". Opp. at 22, Pls. SUMF ¶ 9; *see also* Dkt. 41-2 at 252-281.

the Charges II"])[3] for two reasons. First, the challenge is precluded by collateral estoppel. Second, it contravenes this Court's clear mandate.

Despite all of Plaintiffs' protestations, Opp. at 5-11, the core facts remain. The CIA previously withheld the Joint Report/*Review of the Charges II* in its entirety in *Moore* based on FOIA Exemptions 1 and 3; Judge Lamberth in *Moore* held that the CIA properly invoked those two exemptions. And in this action, the CIA actually released part of the same Joint Report/*Review of the Charges II* and withheld the rest pursuant to the very same FOIA Exemptions. Dkt. 38 ("Br.") at 13-17. Accordingly, Plaintiffs seek a second bite at the apple to revisit the propriety of the CIA's withholding of the same information. The Court should preclude them from doing so.

A. This Case Raises Identical Issues in *Moore* that Judge Lamberth Addressed

As the undisputed evidence confirms, both *Moore* and this case involve the same record and the same FOIA exemptions. Def. SUMF ¶¶ 27-28; DEX 1 ¶¶ 7-8. Despite Plaintiffs' efforts, they cannot dispute this fact. Though Plaintiffs maintain that "[t]he records produced in this case are not the same as produced in *Moore*," *see* Opp. at 7, the CIA's serial numbers dispel any doubt that the records are identical. Indeed, as reflected in the *Moore* filings, the CIA withheld the Joint Report/*Review of the Charges II* in full and labeled it as C06898860. *See* DEX 1 (Williams Decl.) Dkt. 32-1 at 97. That same serial number appears on all the redacted pages that Plaintiffs challenge. *See* DEX 1 (Williams Decl.) Dkt. 32-1 at 27-49. Accordingly, the Joint Report/*Review of the Charges II* that the CIA withheld in full in *Moore* is the same Joint Report/*Review of the Charges II* that the CIA withheld in part in this case. DEX 1 ¶¶ 7-8.[4]

[3] In the hopes of minimizing confusion, the CIA uses its previous shorthand to describe this record and also includes Plaintiffs' shorthand for it.

[4] Though Plaintiffs argue at length that the *FOIA requests* at issue in *Moore* and this case are different, Opp. at 5-6, that fact has no bearing on the analysis. Plaintiffs have disavowed any challenge to the CIA's search for records responsive to the FOIA requests at in this case, Opp. at

Not only does this case involve the same record in *Moore*, but it involves the same legal issues. Previously in *Moore*, the CIA defended its withholding of the Joint Report/*Review of the Charges II* under FOIA Exemptions 1 and 3. DEX 1 ¶ 8 & n.12. Plaintiffs do not contest this point; instead, despite the above, Plaintiffs merely assert that "[t]he issue here is not the same as the issue before the court in *Moore*." Opp. at 6. But that is not correct. The same information at issue in *Moore* is at issue in this case, and the parties previously litigated whether the information was properly exempted from disclosure under FOIA Exemptions 1 and 3. *See* Br. at 14-15; *Moore v. CIA*, 2022 WL 29893419, at *6, *10 (D.D.C. July 28, 2022). As stressed previously, 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." Br. at 15.

Therefore, issue preclusion prevents the overlapping Plaintiffs[5] between *Moore* and this case from relitigating the CIA's withholdings to the Joint Report/*Review of the Charges II* under FOIA Exemptions 1 and 3. *See B&B Hardware Inc. v. Hargis Indus. Inc.*, 575 U.S. 138, 148 (2015).

B. This Court Has Unequivocally Stated that it Does Not Want to Revisit Issues Addressed in *Moore* and Yet Plaintiffs Do Just That

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.").

10, and as such, the only question for this Court's review is whether the CIA was entitled to withhold this document under FOIA's exemptions. And the undisputed fact is that the parties litigated whether the Joint Report/*Review of the Charges II* was properly withheld under the FOIA in *Moore*.

[5]Though all Plaintiffs should be precluded from raising this issue again because it contravenes this Court's admonition, the CIA only contends that issue preclusion prevents the overlapping Plaintiffs (*i.e.*, Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter) from bringing this withholding/redaction challenge a second time.

See also Br. at 15. Plaintiffs do not contest this and instead solely maintain that "the records at issue in this case were neither provided nor sought in the previous case." Opp. at 9. That assertion is incorrect. *See* Br. at 15-16. This is an identical challenge to what Judge Lamberth addressed in *Moore*, and thus, in bringing this challenge a second time, Plaintiffs do not heed this Court's directives for this case. All Plaintiffs in this action should therefore be precluded from getting their second bite at the apple. They should instead—if procedurally proper at this point—seek reconsideration in the United States District Court for the District of Columbia.

II. THE CIA PROPERLY REDACTED THE JOINT REPORT/*REVIEW OF THE CHARGES II* UNDER FOIA EXEMPTIONS 1 AND 3

Consistent with its obligations under the FOIA, the CIA met its burden to explain why the redactions made to the Joint Report/*Review of the Charges II* were proper under FOIA exemptions 1 and 3. Br. at 18-21. Plaintiffs' arguments to the contrary do not pass muster.

A. The Redacted Pages of the Joint Report/*Review of the Charges II* Comprises National Security Information which is Exempted from Disclosure Under FOIA Exemption 1

FOIA Exemption 1 permits withholding information that is properly classified pursuant to an Executive Order that provides for information to "be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1).

Proper Classification. Here, the redacted pages of the Joint Report/*Review of the Charges II* are properly classified pursuant to Executive Order 13,526. Br. at 19-20. Plaintiffs do not dispute that the CIA met all the procedural requirements identified in Executive Order 13,526. *See* Opp. at 16-17. Instead, their opposition focuses on the substantive compliance with this Executive Order—contending that the Williams Declaration is "conclusory and merely recite[s] statutory standards" and failed to explain "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." Opp. at 16.

Contrary to what Plaintiffs maintain, the Williams Declaration provides a thorough account of the type of information contained in the redacted portions of Joint Report/*Review of the Charges II*. DEX 1 ¶¶ 16-20. Indeed, the Williams Declaration explains why each type of information at issue can either harm the national defense or foreign relations and does not do so in a conclusory manner. *See* DEX 1 ¶¶ 16-20. Reading Plaintiffs' assertion that the Williams Declaration is conclusory and only recites statutory standards, Opp. at 16, one would anticipate that the Williams Declaration would have stated merely that the redacted information would harm the national defense or foreign policy and nothing further. But it does not do that, and in fact, it follows what Judge Lamberth found to be legally sufficient in *Moore*. 2022 WL 2983419, at *6; Williams Decl., Dkt. 38-1 at 51-76. More specifically, the Williams Declaration explains the different types of classified information contained within the withheld portions of the Joint Report/*Review of the Charges II* and details how information of each types, if revealed, would "reasonably harm the national security of the United States." *See, e.g.*, DEX 1, ¶ 18 (explaining, in the context of "intelligence activities," that the "Joint Report reflects certain priorities of specific U.S. intelligence targets, the location of CIA activities, the targets of specific CIA operations and analysis, and Agency processes for handling intelligence information"). As the Fourth Circuit recently held, the government can meet is burden to justify its withholdings by "group[ing the records] into functional categories, and demonstra[ting] how release of information contained within those functional categories could be reasonably expected" to harm national security or foreign relations. *Zaid v. Dep't of Just.*, 96 F.4th 697, 705 (4th Cir. 2024). All told, and consistent with *Moore*, the CIA discharged its evidentiary obligations.

Of course, Plaintiffs point to no case law to justify its assertion that the CIA must meet its burden by explaining with explicit particularity how the "Russian accounts on the reliability of the 1205/735 Documents could have an adverse effect on national security or foreign policy." Opp. at 16. That is merely a standard they have invented—especially when *Moore* found that the CIA's previous explanations were sufficient: "These explanations and the sworn affidavit from an original classification authority meet the required standard for summary judgment." 2022 WL 2983419, at *5 (cleaned up). In any event, in order to meet its burden under Exemption 1, the CIA does not need to reveal the very facts that it is seeking to protect from disclosure. And indeed, other courts have repeatedly rejected this very argument—a demand for a "further explanation from the CIA about how release of the information . . . 'could actually contribute to the potential loss of national security,'" *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009)—and have upheld withholdings under FOIA Exemption 1 based on CIA declarations with nearly identical level of detail, *see Donoghue v. NARA*, 754 F. Supp. 3d 81, 95-97 (D.D.C. 2024); *Ullah v. CIA*, 435 F. Supp. 3d 177, 183-85 (D.D.C. 2020).

Nor are the added details that Plaintiffs ostensibly seek here as innocuous as they make them appear. "Minor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." *Larson*, 565 F.3d at 864; *see also United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) ("The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."). To that end, "[t]he CIA has the right to assume that foreign

intelligence agencies are zealous ferrets." *Larson*, 565 F.3d at 864 (quoting *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982)). That is why "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts." *Bowers v. U.S. Dep't of Just.*, 930 F.2d 350, 357 (4th Cir. 1991).

All told, the CIA adequately described the categories of information redacted in the Joint Report/*Review of the Charges II*. As those "grounds are reasonable and consistent with the applicable law," this Court should uphold the CIA's assertion of Exemption 1. *Young v. CIA*, 972 F.2d 536, 539 (4th Cir. 1992).

***CIA's Good Faith*.** Though the CIA has only shown good faith, Plaintiffs next attempt to avoid the clear application of FOIA Exemption 1 by asserting that the CIA engaged in bad faith. Opp. at 11. To be clear, Plaintiffs do not suggest that the CIA has exercised anything but good faith in processing Plaintiffs' FOIA request; rather, Plaintiffs take aim at the CIA's underlying conduct, asking this Court to conclude in asserting that the "CIA's NIE was written [**in 1998**] in bad faith" and the CIA "redacted information because it corroborates the numbers appearing in the 1205/735 documents." Opp. at 11.

There is no indication that the Fourth Circuit has embraced the theory that an agency's "underlying conduct" can be the source of "bad faith" sufficient to preclude application of FOIA Exemption 1. Though such an approach was adopted by the Sixth Circuit in *Rugiero v. United States Department of Justice*, 257 F.3d 538 (6th Cir. 2001), it appears that the Fourth Circuit only looks at *the FOIA declarant's* putative bad faith. *See Young*, 972 F.2d at 539 (affirming grant of summary judgment where requester did "not allege that the CIA acted in bad faith in its declarations). On that basis alone, this Court need not wade further into Plaintiffs' arguments. But even if the Court did, Plaintiffs have failed to overcome the "presumption of good faith" that are

accorded to all agency declarations in FOIA actions. *Empower Oversight Whistleblowers & Research v. U.S. Dep't of Veterans Affairs*, 2024 WL 3278613, at *11 (E.D. Va. July 1, 2024).

To prevail on any bad faith argument, Plaintiffs must put forward "tangible evidence of bad faith" to overcome the CIA's declarations. *Schaerr v. U.S. Dep't of Just.*, 69 F.4th 924, 931 (D.C. Cir. 2023); *see also Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979) ("The sufficiency of the affidavits is not undermined by a mere allegation of agency misrepresentation or bad faith, nor by past agency misconduct in other unrelated cases."). This "is a tough hill to climb" because the good faith presumption "applies with special force in the national security context," including under FOIA, "where [the court must] given substantial weight to an agency's affidavit and will not second-guess its conclusions even when they are speculative to some extent." *Turse v. U.S. Dep't of Def.*, 2025 WL 588203, at *3 (D.D.C. Feb. 24, 2025) (alteration in original) (quoting *Schaerr*, 69 F.4th at 930-31). Indeed, given the deference owed to the Executive Branch in the national security context, courts do "*not* ascribe bad faith to an affidavit that plausibility asserts adverse national security consequences." *Schaerr*, 69 F.4th at 931 (emphasis added); *Am. Ctr. for L. & Just. v. U.S. Dep't of State*, 354 F. Supp. 3d 1, 13 (D.D.C. 2018) (holding that redactions are justified under Exemption 1 if, "independent of any desire to avoid embarrassment, the information withheld [was] properly classified" (alteration in original) (quoting *Wilson v. Dep't of Just.*, 1991 WL 111457, at *2 (D.D.C. June 13, 1991))).

Applying these principles here, Plaintiffs have not met their burden. As this information is properly classified, as noted above, it has been properly withheld under FOIA Exemption 1. *Am. Ctr. for L. & Just.*, 354 F. Supp. 3d at 13. Moreover, that the CIA disclosed records to cause Plaintiffs to question the CIA's underlying work confirms that the CIA engaged in good faith. *See Turse*, 2025 WL 588203, at *4 ("That Defendants have disclosed facts causing Plaintiff to question

the legality of the drone strike, if anything, supports the good faith of the declarants, not the inference that they are improperly classifying information or are acting in bad faith."). If the CIA wanted to shield itself from scrutiny, it could have simply withheld the entire record. But it did not. Instead, the CIA disclosed, to the greatest extent permissible under the FOIA, Senator Smith's critique of the national intelligence community's work (*i.e.*, *Critical Assessment*) and the rebuttal to that critique (*i.e.*, Joint Report/*Review of the Charges II*); *see also* Opp. at 10 (complementing CIA's efforts in this case because it released "another 130 separate records totaling 1,578 pages"). That reflects the CIA's efforts to publicly air as much as possible on these matters without compromising intelligence methods and sources.

Moreover, even looking to the substance of Plaintiffs' contentions regarding the reported 1205/735 figures, the Joint Report/*Review of the Charges II* quickly dispels them. As the Joint Report/*Review of the Charges II* makes plain, the original NIE was not intended to review the substance of the 1205/735 documents. *See* Dkt. 41-5 at 1. That was Senator Smith's assumed expectation regarding the NIE's scope of work, which thereby accounts for his criticism of the NIE's reporting of these issues as the NIE did not meet his expectations. *See, e.g.*, Opp. at 13. Responding to Senator Smith's criticism, the Joint Report/*Review of the Charges II* undertook its own research and analysis to review the numbers reported in the 1205/735 documents. *See* Dkt. 41-5 at 2. After "three months of research and analysis" the Joint Report/*Review of the Charges II* separately concluded that "the 735 and 1205 documents are genuine GRU documents, but the information contained in them related to numbers of POWs held by the Vietnamese cannot be relief upon." *Id.* Thus, the Joint Report/*Review of the Charges II* agreed that "the documents are genuine and that other information contained in them is valid[, b]ut the information on the numbers cannot be accurate." *Id.* In short, even though Plaintiffs may disagree with the ultimate conclusion

the CIA and the Department of Defense provided in the Joint Report/*Review of the Charges II*, that record demonstrates the CIA's good faith from the outset, and thus, Plaintiffs have not met their burden to establish bad faith. That Plaintiffs have not even engaged with the determinations of the Joint Report/*Review of the Charges II* only confirms this conclusion. *See, e.g.*, *DiBacco v. U.S. Dep't of Army*, 234 F. Supp. 3d 255, 276 (D.D.C. 2017), *aff'd*, 926 F.3d 827 (D.C. Cir. 2019) (holding that a subsequently released report demonstrated that that agency had been acting in good faith).

***Age of Records*.** To support release, Plaintiffs argue that the CIA failed to "discuss the age of these records" which is significant, they maintain, because "[t]he standard for withholding is, in part, a function of the age of the document." Opp. at 16. Setting aside that Plaintiffs have not identified a single legal authority to support this assertion, the CIA *did* address the age of the Joint Report/*Review of the Charges II* and nevertheless concluded that protecting the information was necessary as its release would harm national security, foreign relations, or both. DEX 1 ¶ 17. Indeed, the CIA's classification authority testified that "[d]espite the passage of time, this information remains currently and properly classified." DEX 1 ¶ 17. Moreover, as other courts have held—including Judge Lamberth on these very records—agencies can properly invoke FOIA Exemption 1 for "old" records as the exempted information may still bear on sources and methods that need ongoing protection. *See Moore*, 2022 WL 2983419, at *7 (rejecting Plaintiffs' argument that records "are too old to justify continued declassification" and reasoning that the Court was "not in a position to second-guess an agency's classification decisions"); *see also Wolf v. CIA*, 473 F.3d 370, 377 (D.C. Cir. 2007) ("Moreover, it is logical to conclude that the need to assure confidentiality to a foreign source includes neither confirming nor denying the existence of records even *decades* after the death of the foreign national." (emphasis added)); *WP Co. LLC v. CIA*, 2024

WL 983328, at *6 (D.D.C. Mar. 7, 2024) ("While some of the CIA's intelligence sources, methods, and international relationships have surely become outdated since these records were created, it is possible that the sources, methods, and relationships that the CIA has withheld from disclosure *remain part* of the CIA's arsenal to protect the national security." (emphasis added)). In sum, Plaintiffs are wrong to suggest that age alone merits the release of the withheld information in the Joint Report/*Review of the Charges II*.

For similar reasons, Plaintiffs' argument regarding the automatic declassification provision in Executive Order No. 13,526 does not aid their argument. As they see it, § 3.3 of Executive Order 13,526 "mandates disclosure of 25-year-old records in the absence of an applicable FOIA exemption." Opp. at 17. Plaintiffs are incorrect and outright ignore key provisions of the automatic declassification provision. Section 3.3(b) expressly empowers agency heads to "exempt from automatic declassification" nine categories of information from the mandatory automatic declassification provision of the Executive Order. *See* Exec. Order No. 13,526 § 3.3(b). Relevant here, the CIA can exempt from automatic declassification any information that "the release of which should be expected to: (1) reveal the identity of a confidential human source, a relationship with an intelligence or security service of a foreign government or international organization, or a nonhuman intelligence source, or impair the effectiveness of an intelligence method currently in use, available for use, or under development . . . (6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States." Exec. Order. 13,526 § 3.3(b). Accordingly, Executive Order 13,526 does not, as Plaintiffs maintain, require declassification of all information over 25 years old.

As the Williams Declaration explained, the information withheld in the Joint Report/*Review of the Charges II* falls within the exemptions for automatic declassification. The redacted information in the Joint Report/*Review of the Charges II* pertains to intelligence activities, intelligence methods, and classified relationships, DEX 1 ¶¶ 18-20, and as such, are properly exemptible from the automatic declassification provision. Moreover, Judge Lamberth in *Moore*, similarly concluded that this information "plainly fall[s]" with the exceptions for automatic declassification. *Moore*, 2022 WL 2983419, at *6.

In conclusory manner and without any analysis, Plaintiffs also claim that the CIA violated Executive Order No. 12,812 and Presidential Decision and Directive 8 ("PDD-8"). Opp. at 17-18. As a general matter, Executive Order No. 12,812 directed agencies to conduct a declassification review of "all documents, files, and other materials pertaining to American POWs and MIAs list in Southeast Asia" pursuant to the declassification protocols of Executive Order No. 12,356 and release any records "without comprising United States national security."[6] *See* Exec. Order No. 12,812 (July 22, 1992). PPD-8 required that all these reviews required in Executive Order 12,812 be completed by November 11, 1993. *See* DEX 2. The problem with Plaintiffs' contention is that the Joint Report/*Review of the Charges II* was not authored until February 29, 2000, DEX 1 ¶ 7 n.11, and therefore postdates all obligations identified in Executive Order 12,812 and PPD-8.[7] As such, it cannot be fairly said that the CIA violated these provisions. Moreover, nothing in either document required the declassification of records pertaining the identified subject matter—they only directed that the Executive Branch conduct a declassification review. Exec. Order. 12,812

[6] Executive Order No. 12,356 was subsequently revoked. *See* Executive Order No. 12,958 § 6.1(d), 60 Fed. Reg. 19,825 (Apr. 17, 1995).

[7] The same is true with the other record that Plaintiffs try to challenge at the 11th hour. The *Critical Assessment* was dated November 1998. *See* Dkt. 41-2 at 236.

§ 2; DEX 2. Considering that CIA conducted a review of the Joint Report/*Review of the Charges II* and declassified some portions of it, DEX 1 ¶ 7, the CIA discharged any obligations it might have under Executive Order 12,812 and PDD-8.

B. Two Statutes Preclude Disclosure of the Redacted Information in the Joint Report/*Review of the Charges II* and Thus, the CIA Properly Invoked FOIA Exemption 3.

The undisputed evidence confirms that 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, preclude disclosure of the information redacted in the Joint Report/*Review of the Charges II*. Br. at 21-22. Significantly, Plaintiffs do not contest that these statutes can be used to withhold information under FOIA Exemption 3, and Plaintiffs do not contest that the *type* of information CIA identified falls subject to the protection of either of these two statutes. Opp. at 19-20. In failing to make such an argument, Plaintiffs have effectively conceded that the CIA properly redacted this information under FOIA Exemption 3.

Importantly, when reviewing courts examine the agency's assertion of Exemption 3, courts do *not* "closely scrutinize the contents of the withheld document; instead, [they] determine on 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) (quotation omitted); *accord Driggs v. CIA*, 2024 WL 2303842, at *1 (E.D. Va. May 21, 2024) (Novak, J.). Given this well-established standard, Plaintiffs' decision to forgo any argument that the National Security Act or the Central Intelligence Act cannot be used to justify Exemption 3 *or* that the information the CIA identified is not protected by either statute operates as a concession.

Plaintiffs' lone argument to challenge the CIA's redaction inverts this standard on its head. In this regard, Plaintiffs fault the CIA because its declaration does not identify "any connection between what the Russians said about the veracity of the 1205/735 numbers and national security."

Opp. at 19. But there is no requirement to do so. Instead, to defend the redactions, the CIA was obligated only to identify "a relevant statute and the inclusion of withheld material within the statute's coverage." *Driggs*, 2024 WL 2303842, at *1; *see also CIA v. Sims*, 471 U.S. 159, 168-69 (1985) (explaining that National Security Act "indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure"). The CIA did just that and summary judgment should therefore be granted to the CIA. Br. at 22 (citing DEX 1 ¶¶ 23-24).

Lastly, Plaintiffs point to an Affidavit from Norman Kass as evidence that "U.S. intelligence officials were [not] concerned with public disclosure upon its receipt of the information." Opp. at 19. This argument fails for two reasons: one legal, one factual. Legally, the opinions of former U.S. intelligence officials do not and cannot supersede Congress's statutory directives. When Congress mandates that "intelligence sources and methods" shall be protected, 50 U.S.C. § 3024(i)(1), contrary opinions about the propriety of such protection cannot supplant that prohibition. Factually, Mr. Kass's affidavit does not purport to establish that he had any conversations with U.S. intelligence officials to supply him with firsthand personal knowledge of the facts contained within his affidavit. Per his own affidavit, he has only ever spoken with "former and active-duty civilian and military personnel, veterans of past military engagements, archivists, officials of the Russian government, members of the press and others." Dkt. 41-6 at 2. Of course, even if he had such knowledge, any testimony about those second-hand conversations would be hearsay. Accordingly, to the extent the opinion of a U.S. intelligence official matters for this FOIA analysis, Plaintiffs have failed to provide any direct evidence of it.

In the end, the undisputed evidence confirms that the CIA properly redacted the information in the Joint Report/*Review of the Charges II* pursuant to FOIA Exemption 3.[8]

III. PLAINTIFFS FORFEITED ANY CHALLENGE TO THE CIA'S REDACTIONS TO THE *CRITICAL ASSESSMENT* AND THE CIA'S REDACTIONS ARE OTHERWISE PROPER UNDER THE FOIA

Citing their own "inadvertent neglect," Plaintiffs also seek to challenge the CIA's redactions to the *Critical Assessment*. *See generally* Opp. at 11 (referencing Exhibit B, Dkt. 41-2 at 236-251). Plaintiffs' belated claim fails for at least two reasons. First, Plaintiffs forfeited this claim. Second, the CIA properly redacted the portions of the *Critical Assessment* pursuant to FOIA Exemptions 1, 3, and 6.

A. Except for the Redactions Made to the Joint Report/*Review of the Charges II*, Plaintiffs Forfeited All Claims Regarding the CIA's Withholdings and Redactions in Connection with Their FOIA Requests

After meeting and conferring with Plaintiffs' counsel to understand what issues in the case remain after the CIA completed its production, Plaintiffs identified that they only wanted to challenge the redactions made to one document: the Joint Report/*Review of the Charges II*. Indeed, in a status report, Plaintiffs represented to this Court and the CIA "that Plaintiffs want to understand the basis for redactions made under FOIA exemption (b)(1) and (b)(3) for *one* of the records released on December 3, 2024." Dkt. 34 at 2 (emphasis added); *see also* DEX 4 ("Attached are the only redactions that the plaintiffs will challenge.").[9] Based on that representation, the CIA

[8] Should the Court conclude that the CIA properly withheld the redacted information under FOIA Exemption 3, the Court does not need to consider whether Exemption 1 was properly invoked. Indeed, all redactions to the Joint Report/*Review of the Charges II* were made pursuant to FOIA Exemption 3 and *some* were made pursuant to FOIA Exemption 1. *See generally* Dkt. 38-1 at 27-49. Thus, the Court can grant summary judgment to the CIA based on the Exemption 3 analysis alone.

[9] Moreover, as noted above, Plaintiffs did not dispute the uncontroverted evidence that Plaintiffs were only challenging the 23 pages of redactions the CIA made to the Joint Report/*Review of the Charges II*. DEX 1 ¶ 7.

set to work to prepare the evidence to show why its redactions to that one record were proper under Exemptions 1 and 3 of the FOIA and sought additional time to do so. *See generally* Dkt. 35.

Yet despite these clear representations, Plaintiffs have now represented that they "inadvertently neglected to inform defendant that plaintiffs also challenge the redactions to Senator Smith's *Critical Assessment*." Opp. at 11. That conclusory representation does not offer any explanation as to why this belated discovery could not have been identified sooner—especially when throughout the early months of 2025 Defendant and Plaintiffs were conferring at length about the remaining issues in the case. That failure to do so confirms that Plaintiffs have forfeited any challenge to the redactions to this report and thus the Court should not review the merits.

It is well established that "[w]hen the parties make representations at a conference about which issues remain outstanding, they may fairly be held to those oral representations." *Am. Ctr. for Law & Just. v. Dep't of Just.*, 325 F. Supp. 3d 162, 168 (D.D.C. 2018) (citing *Genereux v. Raytheon Co.*, 754 F.3d 51, 57-59 (1st Cir. 2014)). That equally applies to representations in status reports in FOIA actions: "[W]here sophisticated parties to a FOIA case have agreed to narrow the issues in a written status report, they generally may be held to their agreement under traditional waiver principles." *Id.* Further, when a FOIA plaintiff makes those affirmative representations and "narrows his FOIA request in a joint status report, it supersedes any broader request set forth in the plaintiff's complaint." *Id.*; *see also, e.g.*, *DeFraia v. CIA*, 311 F. Supp. 3d 42, 48 (D.D.C. 2018) (finding plaintiff waived right to challenge withholdings of other documents when status reports narrowed dispute to specific contracts); *People for Am. Way Found. v. Dep't of Just.*, 451 F. Supp. 2d 6, 12 (D.D.C. 2006) (finding plaintiff had narrowed requests as noted in status reports). In short, considering Plaintiffs' representations, they have forfeited any challenge to the CIA's redactions to the *Critical Assessment*. This Court need not consider the merits of that challenge.

B. The CIA's Redactions are Fully Consistent with FOIA Exemptions 1, 3, and 6

The CIA redacted portions of the *Critical Assessment* pursuant to FOIA Exemptions 1, 3, and 6. As a threshold matter, however, the CIA clarifies that Plaintiffs have attempted to put at issue portions of a record that the CIA did *not* release in this litigation. *See* Opp. at 4 (referencing Exhibit B, Dkt. 41-2 at 235-251). In connection with this action, the CIA released a duplicate version of the critical assessment but with updated redactions—often revealing more information than what Plaintiffs attached with their summary judgment papers. *See* DEX 3 ¶ 3 n.6. All told, the proper set of redactions for the Court to analyze is Defendants' Exhibit 5. *See* DEX 5.

FOIA Exemptions 1 and 3. For the same reasons that the Joint Report/*Review of the Charges II* is properly redacted under FOIA Exemptions 1 and 3, *supra* at Part II, so too is the *Critical Assessment* properly redacted under FOIA Exemptions 1 and 3. The Supplemental Williams Declaration explains at length that the redaction portions of the *Critical Assessment* involve matters pertaining to the CIA's intelligence activities, intelligence methods, and classified relationship—each of which, if disclosed, would cause serious harm to the United States' national security. DEX 3 ¶¶ 4-9. Further, the Supplemental Williams Declaration explains how the redacted information is also prohibited from disclosure under the National Security Act and Central Intelligence Agency Act. DEX 3 ¶¶ 10-14. In sum, as the Court should conclude that the Joint Report/*Review of the Charges II* is properly redacted under FOIA Exemptions 1 and 3, it should similarly conclude that the CIA's redactions to the challenged pages of the *Critical Assessment* are proper.

FOIA Exemption 6. Unlike the Joint Report/*Review of the Charges II*, the CIA made redactions to the challenged pages of the *Critical Assessment* under FOIA Exemption 6. Exemption 6 safeguards from disclosure "personnel and medical files and similar files the

disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(6). Determining whether Exemption 6 applies is a two-step process. *See Empower Oversight Whistleblowers & Research v. Nat'l Insts. of Health*, 122 F.4th 92, 106-07 (4th Cir. 2024). "First, the file must be identified as the type considered by statute," *i.e.*, a file similar to a personnel or medical file. *Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 46 (D.D.C. 2012). If the information is contained in a "similar file," "courts employ a balancing test that weighs the individual's privacy interests against the public's interest in disclosure." *Solers, Inc. v. IRS*, 827 F.3d 323, 332 (4th Cir. 2016).

Step 1. The *Critical Assessment* is a "similar" file within the meaning of 5 U.S.C. § 552(b)(6). Indeed, as the Supreme Court made clear, "the protection of an individual's right of privacy, which Congress sought to achieve by preventing the disclosure of [information] which might harm the individual, surely was not intended to turn upon the label of the file which contains the damaging information." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601 (1982). Therefore, "a record need not be like a personnel file in the sense that it is employment-related or a medical file in the sense that it contains a record of a person's medical history or medical treatment and care." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014). "Indeed, the record need not even be a 'file.'" *Id.* Nor does the information in the file need to be "intimate": "the threshold for application of Exemption 6 is crossed if the information merely applies to a particular individual." *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin.*, 920 F.2d 1002, 1006 (D.C. Cir. 1990) (en banc); *accord Empower*, 122 F.4h at 107 (holding that email addresses in agency emails qualify as "similar" files for purposes of Exemption 6).

Here, the Supplemental Williams Declaration explains that the redacted information in the *Critical Assessment* contains personally identifying information regarding third-party individuals

and other government officials. DEX 3 ¶¶ 15-16. As *Empower* makes plain, that information falls within the ambit of Exemption 6, and thus, this Court may proceed to Step 2 of the analysis. 122 F.4th at 107.

Step 2. The Court must next assess whether disclosure would constitute "a clearly unwarranted invasion of privacy." *Solers*, 827 F.3d at 332. "To determine whether an invasion of privacy would be 'clearly unwarranted,' courts employ a balancing test that weighs the individual's privacy interests against the public interest in disclosure." *Id.* The public interest is served to "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.*; *see also U.S. Dep't of Just. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989); *Milton v. U.S. Dep't of Just.*, 783 F. Supp. 2d 55, 58 (D.D.C. 2011). "Conversely, there is no public interest in disclosure of information about private citizens that reveals little or nothing about an agency's own conduct." *Milton*, 783 F. Supp. 2d at 58. The requester bears the burden to establish that disclosure of private information is in the public interest. *Smith v. Dep't of Lab.*, 798 F. Supp. 2d 274, 285 (D.D.C. 2011) (noting that this burden requires showing that disclosure would serve to "check against corruption and to hold the governors accountable to the governed").

Applying these principles here, Plaintiffs have failed to put forward any justification that the intrusion of privacy is warranted. *See* Opp. at 11, 15-20; DEX 3 ¶ 18. It is too late for them to do so now. *Patrick v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 860 F. App'x 828, 833 (4th Cir. 2021) ("We do not credit Patrick's untimely argument, because arguments raised for the first time in a party's reply brief generally are insufficient for consideration by the district court and are not reviewable on appeal."). But even if Plaintiffs had put forward a justification, it would fall short. As the undisputed evidence shows, disclosure of this identifying information could lead

to unwanted contact or harassment by members of the press or other interested parties. DEX 3 ¶¶ 15-16. Moreover, none of the protected information would shed light on the activities or operations of the Federal Government such that an intrusion of privacy is possibly warranted. DEX 3 ¶¶ 16-18 Given this, the redacted information is properly protected under Exemption 6. *Empower* 122 F.4th at 107 (holding NIH properly applied Exemption 6 to employee email addresses as they shed no light on government operations or the origins of the COVID-19 pandemic); *Moore*, 2022 WL 2983419, at *10-11 (holding that similar rational supported CIA's redactions of records under FOIA Exemption 6); *Lesar v. U.S. Dep't of Just.*, 636 F.2d 472, 487 (D.C. Cir. 1980) ("As several courts have recognized, these agents have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives.").

Therefore, to prevent the unwarranted intrusion into the privacy of U.S. Government officials and other third parties, the CIA properly applied Exemption 6 when redacting portions of the *Critical Assessment*. All told, the Court should reject Plaintiffs' belated challenge.

IV. PLAINTIFFS CONCEDE THAT THE CIA'S SEARCH FOR RECORDS WAS PROPER UNDER THE FOIA

The undisputed evidence confirms that the CIA discharged its obligations under the FOIA in connection with its search for records. Br. at 23-25. Plaintiffs' Opposition confirms this as they concede that they "do not challenge the CIA's search." Opp. at 10. In failing to respond, Plaintiffs effectively have "conceded [the] point" by failing to offer the Court any reason to rule in their favor. *Amazon.com., Inc. v. WDC Holdings LLC*, 2023 WL 2815140, at *11 (E.D. Va. Apr. 6, 2023). Indeed, the Court may take the CIA's asserted facts for this claim as conceded and deem Plaintiffs to have abandoned this claim. *Orbit Corp. v. FedEx Ground Package Sys., Inc.*, 2016 WL 6609184, at *15 (E.D. Va. Nov. 8, 2016) (collecting cases) (observing that courts "have held that a plaintiff's

failure to respond to a summary judgment motion constitutes waiver or abandonment of a claim"); *Ruddy v. Bluestream Prof. Serv., LLC*, 444 F. Supp. 3d 697, 714 n.34 (E.D. Va. 2020) (same); *see also Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 415-16 (4th Cir. 1993) (holding that district courts may not rest on failure to oppose as the *sole* basis for granting summary judgment to moving party). The Court should therefore grant summary judgment to the CIA in connection with its search for records responsive to Plaintiffs' FOIA request.

CONCLUSION

For all the reasons above and for those raised in the CIA's Opening Brief, the CIA respectfully requests that the Court grant its motion, enter judgment in its favor, and deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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