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

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

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR *IN CAMERA* REVIEW

Defendant, through its undersigned counsel, respectfully submits this memorandum of law in opposition to Plaintiffs' motion for *in camera* review (Dkt. 47).

INTRODUCTION

Plaintiffs have not met their burden to require this Court to conduct an *in camera* review of the two records that the Central Intelligence Agency ("CIA") redacted in part in connection with their FOIA request. All the information that the Court needs to resolve this Freedom of Information Act ("FOIA") case is found in the CIA's memorandum of law in support of its motion for summary judgment and supporting exhibits (Dkt. No. 38). Indeed, Fourth Circuit precedent makes clear that *in camera* review is only appropriate in FOIA actions where the agency has failed to meet its burden to justify the asserted FOIA exemptions. Plaintiffs have not met this standard. The CIA has thoroughly explained in its declarations why these two records contain information protected from disclosure under FOIA Exemptions 1 and 3. As the CIA's summary judgment papers explain, the redacted information is properly classified, and two statutes additionally preclude its disclosure. That alone is sufficient to deny Plaintiffs' motion. But separate from this, two additional

considerations counsel against an *in camera review*. First, there is an additional burden imposed upon the Court in handling classified information and such burden can be avoided if the reviews are not requested. Second, in FOIA actions involving national security, courts have routinely counseled against *in camera* reviews as the best evidence for assessing whether information is classified comes from an declarant with original classification authority.

Therefore, considering the totality of these circumstances, the Court should deny Plaintiffs' motion for *in camera* review.

ARGUMENT

The Court should not order *in camera* review in this action given that the CIA's declaration supplies all the factual support for the agency's redactions under FOIA Exemptions 1 and 3, the undue burden it would impose on the Court, and the significant national security context out of which this action arises. In short, many of the reasons for which the CIA is entitled to summary judgment in this action are the same reasons as to why *in camera* review is not appropriate.

The FOIA provides district courts with the option to conduct *in camera* review. 5 U.S.C. § 552(a)(4)(B). Indeed, under this provision, any district court "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subjection (b) of this action." *Id.* Though the FOIA *authorizes* this Court to conduct *in camera* review, that does not mean *in camera* review is *required* (or even appropriate) in every case or available to FOIA requesters (such as Plaintiffs here) as a matter of right. *See Young v. CIA*, 972 F.2d 536, 539 (4th Cir. 1992); *J.P. Sevens & Co. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983); *see also Falwell v. Exec. Off. of the President*, 158 F. Supp. 2d 734, 738 (W.D. Va. 2001). Accordingly, the Fourth Circuit has recognized that *in camera* review is only available when the responding agency fails to meet its burden to justify its withholdings under the identified exemptions. *J.P. Stevens & Co.*, 710 F.2d at 143 (holding district court erred

in conducting *in camera* review where agency provided sufficient information to justify FOIA exemption). Moreover, "[w]hile an *in camera* review [has been] recognized to be available as a possible method of reviewing an agency decision . . . such a process can be cumbersome and overburdening for the judiciary." *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1250 (4th Cir. 1994). Lastly, special considerations for records involving matters of national security should also be considered when evaluating requests for *in camera* review. *See, e.g.*, *Larson v Dep't of State*, 565 F.3d 857, 863-64 (D.C. Cir. 2009).

Applying all these principles here, the Court should decline to order *in camera* review of the challenged pages of the *Critical Assessment* and the Joint Report/*Review of the Charges II.*

The CIA's Declarant Has Established the Bases Withholding Under FOIA Exemptions 1 and 3. To justify the asserted exemptions over the redactions to both records, the CIA has provided two declarations from Mary Williams. DEX 1 (Dkt. 38-1); DEX 3 (Dkt. 50-2). As explained at length in the CIA's opening and opposition summary judgment briefs, the CIA's declaration provides ample factual basis to support the assertion of FOIA Exemptions 1 and 3. Dkt. 38 at 18-23; Dkt. 50 at 9-25.[1] Moreover, Judge Lamberth previously concluded that this evidence supports the CIA's application of FOIA Exemptions 1 and 3 and similarly concluded that "*in camera* review is neither necessary nor appropriate." *Moore v. CIA*, 2022 WL 2983419, at *6 (D.D.C. July 28, 2022). Indeed, the same types of arguments regarding bad faith that Plaintiffs

[1] The CIA, to avoid presenting redundant information and argument to this Court, respectfully incorporates those arguments by reference here. *See Wright v. Elton Corp.*, 2017 WL 1035830, at *3 n.4 (D. Md. Mar. 17, 2017) (incorporating by reference arguments in prior motions to dismiss in a pending motion to dismiss) *see also Butler v. Stephens*, 600 F. App'x 246, 248 n.4 (5th Cir. 2015) ("[C]ounsel may refer to or incorporate by reference any prior briefs filed in this court without further briefing."); *see also, e.g.*, *McCoy v. Pepco Holdings, Inc.*, 2016 WL 8678000, at *1 n.7 (D. Md. June 10, 2016); *Souryal v. Torres Advanced Enter. Sols., LLC*, 2011 WL 9879175, at *1 (E.D. Va. Dec. 20, 2011).

present here have been rejected by *Moore*. *See id.* at *13 ("Broadly proclaiming 'bad faith non-disclosures' or 'bad faith changes of status of POWs' is not sufficient to illustrate that *in camera* review is necessary."). Thus, Plaintiffs have not even met their threshold burden to merit *in camera* review of the two records. *See* Dkt. 47 ("Pls. Mem.") at 2, 4-5.

***National Security Considerations and Judicial Burden*.** Because this FOIA action bears on matters of national security, the Court should solely rely on the CIA's public declarations. As the D.C. Circuit has noted, "[*i*]*n camera* inspection is particularly a last resort in national security situations like this case—a court should not resort to it routinely on the theory that 'it can't hurt.'" *ACLU v. U.S. Dep't of State*, 628 F.3d 612, 626 (D.C. Cir. 2011) (quoting *Larson*, 565 F.3d at 870); *accord Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015). The reticence and caution toward conducting *in camera* reviews in national security matters exist because even actual judicial review of the underlying materials does not change the deference that this Court must apply to "the predictive judgments made by the government's intelligence agencies regarding questions such as whether a country's changed political climate has yet neutralized the risk of harm to national security posed by disclosing particular intelligence sources." *Larson*, 565 F.3d at 865 (quotation omitted).

Moreover, when parties dispute whether a document is properly classified, that dispute concerns a matter of how to best interpret the document. *Mobley*, 806 F.3d at 588. That is significant here because "*in camera* review is of little help when the dispute centers not on the information contained in the documents but on the parties' differing interpretations as to whether the exemption applies to such information." *Id.* (quoting *Carter v. U.S. Dep't of Comm.*, 830 F.3d 388, 393 (D.C. Cir. 1987)). Thus, because this FOIA action concerns matters of national security unrelated to the contents of the redacted records, this Court should not authorize *in camera* review.

Lastly, the Fourth Circuit has explained that *in camera* review is "cumbersome and overburdening for the judiciary." *Ethyl Corp.*, 25 F.3d at 1250. *Contra* Pls. Mem. at 3. Though this case might involve one or two records, the review will nevertheless place some burdens on the Court. Because the redacted information is classified, it will require special handling and can only be reviewed by certain authorized persons in authorized locations. The administrative burden to ensure that this classified information is properly stored and handled is therefore reason enough to rest on the wholly sufficient unclassified evidence that the CIA submitted for this Court's review.

CONCLUSION

For all the foregoing reasons, this Court should deny Plaintiffs' motion for *in camera* review.

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Respectfully submitted,

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