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

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

PLAINTIFFS' MEMORANDUM IN REPLY TO DEFENDANT'S
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiffs, by counsel, and respectfully submits this Memorandum in Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment.

Contents

I. COLLATERAL ESTOPPEL INAPPLICABLE

1. Record neither Responsive nor Produced in the Previous Case

In response to plaintiffs' observation that "'the records at issue in this case were neither provided nor sought in the previous case.' Opp. at 9," defendant declares, "That assertion is incorrect." Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Reply, at 9. ("*Def. Opp.*").

Not sought. Plaintiffs Statement of Fact No. 2 states that the *Review of the Charges* was not responsive to any FOIA request in *Moore*. The CIA responded that this fact is disputed.

Defendant claims that "[t]he 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." *Id.* at 5. Absent from defendant's response is who, exactly, is said to have "identified" it as a responsive record. Nor does the CIA state what it claims was "conceded by Plaintiffs."

Defendant's referenced Exhibit 1 is the first Declaration of Mary Williams ("*Williams Decl*."), ECF No. 38-1, which states that *Review of the Charges II* was produced "in response to Request 19," which the CIA knows is false.[1] Plaintiffs in *Moore* sought POW records only from

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[1] *See* Plaintiff's Memorandum in Support of its Cross-Motion for Summary Judgment, ECF No. 45 ("*Pl. Motion*") at 6:
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.

the Korean War, whereas the record at issue concerns unrepatriated American POWs from the Vietnam War.

Not produced. Defendant also asserts that the record—which was withheld in its entirety—was, in fact, "produced." "Though Plaintiffs maintain that '[t]he records produced in this case are not the same as produced in *Moore*,' *see* Opp. at 7," writes the CIA, "the CIA's serial numbers dispel any doubt that the records are identical." *Def. Opp.* at 7.

Of course, plaintiffs recognize that the record is the one-in-the-same as identified in *Moore*. Plaintiffs were unaware of the existence of the record until the CIA filed its *Vaughn* index in that case. This revelation was the genesis of plaintiffs seeking disclosure here. The record was first produced in this action.

2. CIA Changed Position

Not only was the record neither sought, nor responsive, in the previous case, the CIA's position is also different here. The *Review of the Charges II* was one of four documents that the CIA had withheld in full in *Moore*. In *Moore*, the CIA stated that "[t]his 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."[2] Here, the CIA has abandoned its position that the ability to see where the redacted sections were located in the report is sensitive information.

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[2] *See 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)(l) 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.

Defendant appears to recognize that the issue is different, writing that "the CIA only contends that issue preclusion prevents the overlapping Plaintiffs… from bringing this withholding/redaction challenge a second time." *Id.* n. 5 at 8 (emphasis supplied).

3. Unavailability of Adjudication in the Previous Case

Defendant further posits that plaintiffs are in the wrong court. "They should instead—if procedurally proper at this point—seek reconsideration in the United States District Court for the District of Columbia." *Id.* at 9. Of course, reconsideration would not be procedurally proper. But even if it were, that court would likely decline to adjudicate the propriety of the withholding of a record that is not even responsive to the FOIA requests at issue, and the CIA would surely argue that it would be improper for the court rule otherwise. It was not up to the plaintiffs in *Moore* to point out to the CIA, or to that court, that one of the four records that the CIA withheld in its entirety was nonresponsive.

Contrary to the clear procedural history of the case, the CIA posits that "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.)." *Id.* at 1.

4. CIA Admits Collateral Estoppel Inapplicable

Plaintiffs' memorandum observed that "Defendant writes that '[f]or those Plaintiffs who were part of both the *Moore* lawsuit and this case issue preclusion prevents them…' *Def. Motion* at 13. It implies, but does not explicitly state, that since *collateral estoppel* applies to the 'overlapping' plaintiffs, it applies to all plaintiffs." *Pl. Motion* at 8.

On the one hand, the CIA continues to declare that *collateral estoppel* operates as a bar, ignoring plaintiffs' cited authority, which held that *collateral estoppel* does not bar adjudication

of an issue in a previous FOIA case absent privity among the plaintiffs. *Favish v. Independent Counsel* 217 F.3d 1168. *See id.* at 8.

On the other hand, the CIA seemingly admits that this action is not barred: "[T]he 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." *Def. Opp.* n. 5 at 8.

Nor does adjudication of the issue run afoul of the Court's admonition that it would not entertain issues previously litigated. The record at issue was neither responsive nor produced in the previous case. The CIA has changed its position on disclosure and, so, the issue is not the same. And the *Moore* court would not have reconsidered its order regarding a non-responsive record.

II. CIA MISSTATES ITS BURDEN UNDER EXEMPTIONS

The burden is on the government to show the applicability of FOIA exemptions. Under 5 U.S.C. § 552 (a)(4)(B), "the burden is on the agency to sustain its action."

Defendant's view of how courts adjudicate FOIA exemptions is incorrect. It posits that an agency need only identify the type of information to prevail on an exemption claim. It cites *CIA v. Sims*, 471 U.S. 159, 168-69 (1985) and this Court's May 21, 2024 order. *Id*. at 18-19.

Neither case supports defendant's approach. *Sims* held that the Director of Central Intelligence had broad authority to protect all sources of information and it was improper to limit this authority to sources to which the CIA had guaranteed confidentiality.

Defendant cites this Court's order denying the request for search of operational files for the proposition that, "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.'" *Def. Opp*. at 19.

However, this Court ruled that an agency's decision to maintain aged files as operational records does not trigger an exception requiring a search of those records under 50 U.S.C. § 3141, but rather, the proper inquiry was the "propriety of the agency's decision to put the requested records into properly exempted files." *Mem. Op*. ECF No 25 at 10. The Court's only discussion of Exemptions was that the CIA Act is incorporated by Exemption 3's language, "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).

The CIA further states that "Plaintiffs' decision to forgo any argument… that the information the CIA identified is not protected by either statute operates as a concession." *Def. Opp*. at 18. However, plaintiffs' cause is founded on the proposition that "the information the CIA identified is not protected."

From the context of the redactions one can glean that the withheld information is what Russians said about the reliability of the 1205/735 documents. Statements of members of a foreign government is the "type" of information that can be exempt from disclosure under Exemptions 1 and 3.[3] Thus, the CIA posits, it has met its burden to show that the information is exempt:

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[3] *See also Def. Opp*. at 10:

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.

* * *

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"). (Emphasis supplied).

> 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.

Id. at 18 (emphasis in original).

"All told," defendant argues, "the CIA adequately described the categories of information redacted in the Joint Report/*Review of the Charges II*." *Id*. at 12.

The CIA relies on two declarations of Mary Williams; her first Declaration, ECF No. 38-1 ("*Williams Decl.*"), and her Supplemental Declaration, ECF No. 51-2 ¶ 5 ("*Supp*. *Williams Decl*."). They both contain the same language regarding Exemptions 1 and 3. The paragraph headed *Intelligence Activities*, states:

> Here, redactions conceal the means, policies, and processes used to collect and analyze certain CIA intelligence interests and activities. Although it is widely acknowledged that the CIA is responsible for conducting intelligence collection and analysis for the United States, the CIA generally does not disclose the targets of specific intelligence collection activities or the operations it conducts or supports.

Supp. *Williams Decl.* ¶ 7.

Absent from the Declaration is how disclosure of what Russian officials related about the reliability of the 1205/735 documents could possibly "disclose the targets of specific intelligence collection activities or the operations it conducts or supports."

Regarding *Intelligence Methods*, the CIA asserts that "the redactions obfuscate specific types of intelligence methods, as well as policies and processes for utilizing those intelligence methods." *Id.* ¶ 8. But how could disclosure of information from the Russians, regarding events occurring over 50 years ago, reveal intelligence methods, or policies, or processes?

Under the heading *Classified Relationships*, the CIA states that "[t]his information constitutes 'foreign government information,'" and "revelation of these relationships could hurt the Agency's relationship with these entities—entities that often agree to cooperate with the CIA on the understanding that the relationship will remain secret." *Id*. But the CIA can redact the information on relationships, and sources, if the CIA can make a plausible case that this information—over 50 years old—is protected.

In response to plaintiffs' repeated question of how disclosure of the information sought could possibly implicate any interest protected by Exemptions 1 and 3, the CIA responds that plaintiffs "identify no legal authority to justify the requested granularity of detail." *Def. Opp*. at 6.

In sum, the CIA does not meet its burden simply by observing that statements by Russian officials is the "type" of information that can be exempt from disclosure under Exemptions 1 and 3—particularly where there is evidence of bad faith.

The context of the Russians' information is relevant here. "The U.S.–Russia Joint Commission on POWs/MIAs (USRJC) was established in 1992 by the Presidents of the United States and the Russian Federation, George H. W. Bush and Boris Yeltsin… to determine the fates of the United States's and the Soviet Union's unaccounted-for service personnel from" various wars, including "Vietnam conflict (Vietnam, Laos and Cambodia)." *Kass Aff*. ¶ 1. "Senator Bob Smith served as U.S. Chairman of the Vietnam War Working Group of the USRJC." *Id.* ¶ 2. The USRJC was a cooperative effort between the Russians and Americans

It does not appear that the U.S. government was concerned with public disclosure upon its receipt of the information on Vietnam era POWs, at least not as far as USRJC knew. *Kass Aff*. ¶¶ 5-7. The CIA responds that "contrary opinions about the propriety of such protection cannot

supplant that prohibition." *Def. Opp*. at 19. But Mr. Kass does not offer any opinions "about the propriety" of the CIA's withholdings. He only relates that no one expressed any concern to him about disclosure of the Russians' accounts of Vietnam-era American POWs during the 18 years that he served as Executive Secretary of the U.S. side of the USRJC.

This cooperation between the Russians and Americans on the issue is evident by Russia's intelligence directorate, the GRU, having provided the 735 Document to the U.S. government in 1993. And the *Critical Assessment* relates Russian cooperation.[4]

Nor can the CIA's nondisclosure be founded on its reluctance to release evidence of the Russian intelligence on the inner workings of the North Vietnamese government. After all, the 1205 Document is the transcript of the Soviet's surreptitiously taped debriefing by a top Vietnamese Army General to Vietnam's Politburo.

In the CIA's view, "the age of the record has no bearing on its classification status." *Id*. at 2. This is not so.

Contrary to the CIA's recitation, plaintiffs did not "suggest that age alone merits the release" (*id*. at 16), or "maintain [that E.O. 13,526] requires declassification of all information over 25 years old." *Id*. Rather, plaintiffs observe that violations of the FOIA in this instance also

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[4] *See Clarke Aff*. ECF No. 44-2 n. 40 at 21, "information provided by GRU Capt. A.I. Sivets… does, in fact, help to confirm that the 1205 document was an accurate representation of the political-military situation in North Vietnam in 1972. So does the information provided by former USSR Central Committee Secretary Katushev, and two Chiefs of the GRU—Generals Ladygin and Korabelnikov—in 1994 and 1997…. General Volkogonov told the U.S.-Russian Commission on POWs and MIAs that his delegation had uncovered… K.F. Katushev, former Central Committee Secretary... told US interviewers…;" *id*. n. 32 at 17: "The Chief of the GRU in 1994, General Ladygin, whose agency acquired the 1205 and 735 documents in 1971 and 1972, stated in writing…;" *id*. n. 33 at 18": "One interviewee, V.V. Dukhin, who served…in Hanoi from 1992 to 1995, said that the former DCM in Hanoi, I.A. Novikov (now deceased) told him…"

violates E.O. 13,526, *Classification Prohibitions and Limitations*, § 3.3, *Automatic Declassification*; E.O. 12812, *Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action*; and the 1993 Presidential Directive ordering the government to comply with that E.O., *Presidential Decision Directive/NSC 8*, *Declassification of POW/MIA Records*.

The CIA's entire discussion on the passage of 50 years since the events reported is "[d]espite the passage of time" (*Williams Decl*. ¶ 17), and "despite the age of the report." *Def. Motion* at 9.

Defendant quotes *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." *Id*. at 15-16. But the CIA does not claim that such a circumstance is present here.

III. BAD FAITH

The CIA proposes that, once it is established that a record is of a type that could be exempt, it is exempt. That may be the procedure that a court may accept, but it is not proper to do so where there is evidence of bad faith.

Plaintiffs submit evidence that the CIA's NIE was written in bad faith. They have good cause to believe that the CIA redacted information because it corroborates the numbers appearing in the 1205/735 Documents. The conclusion of *Review of the Charges II* that "the documents are genuine… but the information on the numbers cannot be accurate" is not made in good faith. ECF No. 41-5 at 2.

The CIA asserts that, "[i]n accordance with E.O. § 1.7(a), none of the information at issue 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." *Williams Decl*., ECF No. 51-2 ¶ 5. Plaintiffs do not agree.

1. Law

"[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). The CIA seeks to distinguish *Rugiero*, relating that "it appears that the Fourth Circuit only looks at *the FOIA declarant's* putative bad faith," and cites *Young* v. *CIA,* 972 F.2d at 539 in support. But *Young* does not help the CIA. The court in that case held that, because the plaintiff had not alleged bad faith, the court had not abused its discretion in declining to undertake *in camera* inspection. Defendant promotes this Court's abandonment of FOIA law that facilitates disclosure of government wrongdoing—as long as the declarant acts in good faith.

The CIA cites authorities holding that agencies are entitled to a presumption of good faith accorded to agency declarations in FOIA actions. Yes, agencies are entitled to a presumption of good faith—but not where plaintiffs introduce evidence of bad faith. Government misconduct can be relevant inquiry under the FOIA to overcome an agency's presumption of good faith. *See also Allen v. CIA*, 636 F.2d 1287 (D.C.Cir. 1980); *Shaw v. U.S. Dep't of State, 559 F.Supp*. 1053, 1056 (D. D.C. 1983); *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" (emphasis supplied).

2. Facts

Plaintiffs proffer evidence of bad faith in the underlying activities which generated the records at issue.

The CIA wholly ignores plaintiffs' evidence: "All told, the CIA's bases for redacting the challenged pages of the Joint Report stand undisputed." *Def. Opp* at 4. The CIA declares that its "record [of disclosure] demonstrates the CIA's good faith… and thus, Plaintiffs have not met their burden to establish bad faith." *Def. Opp.* at 15.

The CIA argues that its admission that the 1205/735 documents are genuine "demonstrates the CIA's good faith from the outset." *Id*. Plaintiffs view that admission differently: "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." *Smith Aff*. ECF No. 44-1 ¶ 14.

Defendant observes that plaintiffs had not critiqued ("not even engaged with") the CIA's *Response to the Charges II*.[5] But if the CIA seeks to refute the allegations in the *Critical Assessment*, by any means, including offering the *Response to the Charges* as evidence of good faith, it is free to do so. It is not up to plaintiffs to rebut evidence that has not been proffered. Moreover, plaintiffs aver that the NIE is indefensible.

The CIA posits that plaintiffs' evidence is "a mere allegation" bad faith, as was the case in *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). *Def. Opp.* at 13. Defendant characterizes Senator Smith's 160-page *Critical Assessment* as containing "no

[5] *Def. Opp.* at 15: "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."

evidence to contradict the CIA's proffered facts as required by the Local Rules." *Def. Opp.* at 4. Plaintiffs believe otherwise. *See, e.g., Pl. Motion* at 12-13:

> 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.

Eight of the CIA's proposed undisputed facts quote the conclusions the *Williams Decl*.[6] ECF No. 38-1. As the statements are the CIA's opinions, and on the ultimate issue at that, plaintiffs responded, "This is an opinion, not a statement of fact." Defendant responds that these responses are "conclusory contentions [that] do not create fact disputes—especially when Plaintiffs adduced no evidence to contradict the CIA's proffered facts." *Def. Op*. at 4. But these so-called "facts" are opinions, and plaintiffs' evidence of bad faith contradicts them.

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[6] *See Pl. Motion* at 23-27: Statement 29 that "Exemption 1 in this case meets the criteria," No. 30 that the "redacted information falls under the classification categories listed," No. 31 that "disclosure of this information could reasonably be expected to result in damage to national security," No. 32 that none of the information conceals violations of law or to prevent embarrassment, No. 34 that disclosure would harm the United States national security international relations, No. 35 that protected information is redacted, No. 37 that redactions concern priority of intelligence activities, and targets, methods, and human sources, and No. 33, which contains 10 statements.

See also CIA response to plaintiffs' statement of fact No. 10, denying that "Senator Smith's responses are completely redacted"—where the Senator is the author—basing denial on "Plaintiffs cited evidence does not provide support for the assertion that Senator Smith's statements were in the redactions…" *Def. Opp*. at 6.

IV. FOIA REQUEST FOR SENATOR SMITH'S CRITICAL ASSESSMENT

Defendant asks the Court to rule in accordance with cases holding that FOIA plaintiffs are generally held to the representations made in status reports, and to hold that plaintiffs waived their objections to the redactions to the *Critical Assessment* by not identifying it in the parties' joint status report.

But the cited authorities do not involve the unusual circumstance where the challenged record was written in response to the omitted record. The *Response to the Charges II* is a retort to the *Critical Assessment* and the very same information is redacted from both records.

The CIA made redactions to the challenged pages of the *Critical Assessment* under FOIA Exemption 6, 5 U.S.C. § 552(b)(6). *See Supp. Williams Decl*. regarding personally identifying information regarding third-party individuals. Plaintiffs do not challenge the CIA's redactions of personally identifying information.

WHEREFORE, plaintiffs respectfully pray that the Court deny defendant's dispositive motion, grant plaintiffs' cross-motion, and to grant plaintiffs' motion for *in camera* inspection.

DATE: June 18, 2025.

Respectfully submitted,

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