[ORAL ARGUMENT NOT SCHEDULED]

No. 22-5235

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACCURACY IN MEDIA, INC.,

Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-Appellant is Accuracy in Media, Inc.

Defendant-Appellee is the Central Intelligence Agency.

No amici curiae participated in the district court.

B. Rulings Under Review

Plaintiff-Appellant seeks review of (1) the Memorandum Opinion entered on July 7, 2022, by the United States District Court for the District of Columbia (Lamberth, J.), and (2) the Order entered on July 7, 2022, by the United States District Court for the District of Columbia (Lamberth, J.).

C. Related Cases

This case has not previously been before this Court. Undersigned counsel is unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(c).

/s/ Graham White
Graham White

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GLOSSARY

CIA	Central Intelligence Agency
FOIA	Freedom of Information Act, 5 U.S.C. § 552
MIA	Missing in action
POW	Prisoner of war

STATEMENT OF JURISDICTION

Plaintiffs Accuracy in Media, Inc., Roger Hall, and Studies Solutions Results, Inc. invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court issued a memorandum opinion and order on July 7, 2022, granting the Central Intelligence Agency's (CIA) motion for summary judgment and denying plaintiffs' motion for summary judgment. Dkt. Nos. 385, 386. Plaintiff Accuracy in Media, Inc. timely appealed on September 6, 2022. Dkt. No. 387. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Plaintiffs Accuracy in Media, Inc., Roger Hall, and Studies Solutions Results, Inc. brought this Freedom of Information Act (FOIA), 5 U.S.C. § 552, suit against the CIA regarding their request for records concerning U.S. servicemembers captured in Southeast Asia during the Vietnam War.[1] Plaintiffs argued that the CIA should be required to search its operational files, which are generally exempt from disclosure under FOIA and were not previously searched. The district court

[1] Plaintiffs Roger Hall and Studies Solutions Results, Inc. are not parties to this appeal and did not oppose the CIA's motion for summary judgment on the search of the operational files.

ordered the CIA to search its operational files. That search yielded no responsive records, and the district court granted summary judgment for the agency. The question presented is whether the CIA conducted an adequate search of its operational files.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

FOIA generally requires federal agencies to release records to the public upon request, with certain exemptions. *See* 5 U.S.C. § 552(a), (b). The CIA Information Act provides one such exemption, stating that the CIA "may exempt [its] operational files . . . from the provisions of [FOIA] which require publication or disclosure, or search or review in connection therewith." 50 U.S.C. § 3141(a). The term "operational files" means files that (i) "document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services"; (ii) "document the means by

which foreign intelligence or counterintelligence is collected through scientific and technical systems"; and (iii) "document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." *Id.* § 3141(b).

B. Procedural Background

1. Executive Order 12,812 directed federal agencies to "declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POWs and MIAs" from the Vietnam era. *See* Exec. Order No. 12,812, 57 Fed. Reg. 32,879 (July 22, 1992). Plaintiff Roger Hall subsequently filed FOIA requests to the CIA for documents regarding U.S. servicemembers captured or missing during the Vietnam War who have not returned. The CIA, which was in the process of releasing documents under Executive Order 12,812, produced responsive records to Plaintiff Hall.

Hall filed suit challenging the adequacy of the CIA's response to his FOIA requests. *See Hall v. CIA*, 437 F.3d 94, 97 (D.C. Cir. 2006) ("*Hall I*"). The district court dismissed the suit, holding that the CIA had properly invoked various FOIA exemptions to justify its

withholding and redaction of certain documents, and that plaintiff had "constructively abandoned his request" for additional documents by failing to pay the required fees. *Id.* at 97-98. This Court dismissed Hall's appeal, ruling that some claims were not timely raised and that others were mooted by the CIA's release of additional documents. *See id.*

2. While *Hall I* was pending in the district court, Plaintiffs filed this suit concerning other FOIA requests to the CIA for records concerning U.S. servicemembers captured in Southeast Asia during the Vietnam War "who have not returned" to the United States. Dkt. No. 114-1, at 10-11. Plaintiffs' FOIA requests, which sought eight categories of records, "overlap[ped] substantially" with the requests at issue in *Hall I*, prompting the district court to conclude that plaintiffs were precluded from "challeng[ing] the CIA's withholding of certain records Hall sought" in his earlier requests. *Hall v. CIA*, No. 04-814, 2005 WL 850379, at *3 (D.D.C. April 13, 2005). Throughout the district court proceedings in this suit, the CIA continued to provide plaintiffs with documents regarding Vietnam-era servicemembers who were prisoners of war or missing in action (POW/MIAs). *See Hall v. CIA*, 268

F. Supp. 3d 148, 159 (D.D.C. 2017). As plaintiffs acknowledge, under Executive Order 12,812 and in response to plaintiffs' FOIA requests, the CIA has released thousands of pages of records "tending to shed light on the fates of prisoners of war and those men otherwise reported as missing in action during the Vietnam conflict." *Id.*; *see* Appellant's Br. 36 (Br.) (providing updated number of total records produced).

The parties have since engaged in multiple rounds of summary judgment briefing that have substantially narrowed the scope of this litigation. *See Hall v. CIA*, No. 04-814, 2019 WL 13160061 (D.D.C. Aug. 2, 2019); *Hall*, 268 F. Supp. 3d at 148; *Hall v. CIA*, 881 F. Supp. 2d 38 (D.D.C. 2012); *Hall v. CIA*, 668 F. Supp. 2d 172 (D.D.C. 2009). As relevant here, the CIA argued in its 2016 summary judgment motion that it conducted an adequate search for records responsive to Items 5 and 7 of plaintiffs' FOIA request. Dkt. No. 248-1 at 2-3, 7-11. Item 5 sought records relating to more than 1,700 individuals "who allegedly are Vietnam era POW/MIAs . . . whose primary next-of-kin . . . have authorized the release of information concerning them." Dkt. No. 248-2 at 4. Item 7 sought "[a]ll records on or pertaining to any search conducted regarding any other requests for records pertaining to

Vietnam War POW/MIAs, including any search for such records conducted in response to any request by any congressional committee or executive branch agency." *Id.* at 5.

The district court held that a genuine issue of fact remained as to the adequacy of the CIA's search for records responsive to Items 5 and 7. *See Hall*, 268 F. Supp. 3d at 160-62. The court found that "[w]hile the plaintiffs have littered the record with plenty of speculation that . . . more records must exist because so many men have been reported missing, they also have pointed to several concrete examples" that "strongly suggest" additional records "do exist." *Id.* at 160. The district court, relying heavily on affidavits submitted by former members of Congress, *see* Dkt. Nos. 83-15, 95-45, 258-4, observed that "plaintiffs present[ed] evidence of imagery of suspected prison camps, up to 1,400 live sighting reports, and named reconnaissance and rescue operations alleged to have taken place." *Id.* at 161.

The CIA explained that it had thoroughly searched all *non*-operational files likely to contain this information, and that it was not required to search or review its operational files under 50 U.S.C. § 3141(a). Dkt. No. 248-1 at 8-9. The district court acknowledged that

the CIA is not required to produce operational files, but stated that it "cannot be left to speculate about whether such [additional] records, if they exist, are among those the CIA Director has designated as operational files pursuant to" § 3141(a). *Hall*, 268 F. Supp. 3d at 161. The district court also questioned how records "more than 60 years old" could "reasonably be considered operational under the statute." *Id.* at 161. The district court then directed the CIA to "confirm or deny the existence of [additional responsive records] in a public filing," including whether the records are "operational" and thus exempt from disclosure under 50 U.S.C. § 3141(a). *Id.*

The CIA attempted to address the district court's concerns in a supplemental declaration, which provided additional details on the agency's efforts to determine if any records should no longer be deemed operational files. Dkt. No. 295-2, at ¶¶ 9-10. The declaration further explained that "[s]ome records, although over 60 years old in some cases, may still contain detailed, still viable sources and methods information which remains very sensitive today. For example, certain operational files, even old ones, may reveal a particular collection

technique that remains viable or which has never been detected." *Id.* at ¶ 11.

The district court responded that it was not satisfied with the government's response. *See Hall v. CIA*, No. 04-814, 2019 WL 13160059 (D.D.C. May 23, 2019). The court explained that it had "asked the government to confirm or deny the existence of any more records[,]" and to explain "whether the records remain operational." *Id.* at *1. The district court subsequently ordered the CIA to "review its operational files and explain with specificity whether any additional responsive records exist and, if so, why they must be exempt from FOIA." *Hall*, 2019 WL 13160061, at *2.

The CIA informed the district court that it conducted a search of its operational files and located no responsive records. Dkt. No. 352. The district court subsequently entered final judgment in favor of the agency. Dkt. No. 353, at 1.

3. Plaintiffs moved for reconsideration of the district court's final judgment order, arguing that the CIA should be ordered to provide a declaration regarding its search of operational records that would allow the court to assess the adequacy of the search. Dkt. Nos. 364, 365. The

district court granted the motions for reconsideration and "reopen[ed] this case for one singular, limited purpose—to consider the adequacy of the [CIA's] most recent search." Dkt. No. 375, at 1. The court's order accordingly directed the CIA to file a "declaration(s) and accompanying dispositive motion concerning its efforts to search its operational files." *Id.* at 6.

The CIA submitted a declaration from Vanna Blaine, who serves as the Information Review Officer for the CIA's Litigation Information Review Office, together with a renewed motion for summary judgment. Dkt. Nos. 376-1, 376-3. The declaration states that "CIA information management professionals searched Agency records in operational file systems," which "included an exhaustive electronic and hard copy search of Agency records[ ] . . . [and] all relevant office databases likely to contain responsive records." Dkt. No. 376-3, at 4. It further explained that the agency "cast a deliberately wide net for the requested records by employing broad search terms such as 'POWs,' 'prisoners of war,' 'MIA,' 'missing in action,' 'Vietnam,' 'task force,' 'House Special POW,' 'image,' and different combinations and variations

of those search terms." *Id.* The search was not limited to a particular date range. *Id.*

The CIA's search of its operational files "generated a few records," which "were retrieved from the database and . . . reviewed . . . to determine whether the records were responsive." Dkt. No. 376-3, at 4-5. Following this review, "the Agency determined none of the potentially responsive documents retrieved using the electronic search protocols were actually responsive." *Id.* at 5. The retrieved documents "contained at most a mere mention of one or more of the terms, but did not address the actual request." *Id.*

Plaintiff Accuracy in Media, Inc. responded with a cross-motion for summary judgment and an opposition to the CIA's summary judgment motion. Dkt. Nos. 377, 378. Plaintiff argued that (1) the CIA should have employed certain, additional search terms, Dkt. No. 378 at 4, 5-8; (2) the CIA's failure to find certain documents indicates it search was inadequate, *id.* at 3-5; and (3) the CIA failed to describe its search in adequate detail, *id.* at 2-3.

The CIA submitted with its reply brief a supplemental declaration from Vanna Blaine providing additional detail on the search of its

operational files. Dkt. No. 383-2. The supplemental declaration explained that "[g]iven the CIA's national security mandate, specific information about Agency databases and exactly how these repositories are structured and searched cannot be described in great detail on the public record." *Id.* at 2. Blaine clarified, however, that "the CIA searched centralized internal databases containing Agency-wide operational files, including cables, intelligence reports[,] and other records" and that "[a]ny database where operational files related to Plaintiff's request could reasonably have been located were searched in the course of this review." *Id.* at 2-3. Blaine further stated that the search "did not include more precise or narrowed terms because utilizing more specific search terms would not have necessarily been effective in identifying documents potentially responsive to Plaintiffs' request, and may have inadvertently excluded otherwise responsive documents that failed to contain the more specific search terms." *Id.* at 3.

4. The district court granted the CIA's motion for summary judgment and found that the agency conducted an adequate search of its operational files. Dkt. No. 385. The district court rejected plaintiffs'

argument that the affidavits from former members of Congress demonstrated that the search was inadequate. *Id.* at 5-6. The court stated that "[f]iles once displayed to plaintiffs' declarants need not exist thirty to fifty years later." *Id.* at 8. But "more fundamentally," the court explained, "plaintiffs' evidence fails given the limited purpose here." *Id.* The court noted that it "specifically ordered a search of operational files" and "plaintiffs' evidence does not establish, or even significantly suggest, that the files referenced are in the CIA's current operational files." *Id.*

The district court next rejected plaintiff's argument that the CIA should have used certain additional search terms. Dkt. No. 385, at 9. The court explained that "agencies generally have discretion in crafting a list of search terms as long as they are reasonably tailored to uncover documents responsive to the FOIA request." *Id.* (quotation marks omitted). The court cited the CIA's explanation that more specific search terms may have omitted potentially responsive documents and concluded that the terms used by the CIA were "reasonably likely to have yielded the files sought by plaintiffs if they were indeed present in the CIA's operational files." *Id.*

Finally, the district court held that the CIA described its search in adequate detail. Dkt. No. 385, at 10. The court related that an adequate description will generally include (1) an explanation of what files were searched, (2) who searched them, and (3) a description of the systemic approach used to locate responsive documents. *Id.* The court held that the CIA satisfied the first prong by "specifying (1) the search terms used, (2) why they were selected, (3) that the search was not limited by the date range, and (4) that both electronic and hard copy files were searched across Agency-wide operational file systems." *Id.* (quotation marks omitted). The CIA satisfied the second prong—who searched—by specifying that "CIA information management professionals" conducted the search of the operational files. *Id.* Third, the district court found that the CIA described its systematic approach to the search by listing the search terms used and describing the subsequent process of reviewing search results. *Id.* And while the court found that "[t]he CIA's description is . . . sufficient on its own merits," it further noted that "this case involves unique circumstances that further counsel ruling in favor of the CIA." *Id.* The court explained that the CIA "rightfully points out the sensitive national

security nature of its operational files" and that "requiring an even more detailed description would be [a] delicate matter." *Id.* at 12.

Plaintiff Accuracy in Media, Inc., but not plaintiffs Roger Hall or Studies Solutions Results, Inc., filed a timely notice of appeal. Dkt. No. 387; *see supra* n.1. The CIA subsequently filed a motion for summary affirmance in this Court, which the motions panel denied. *See* Order 1 (per curiam).

SUMMARY OF ARGUMENT

Plaintiff Accuracy in Media, Inc. challenges the adequacy of the CIA's search of its operational files for records relating to U.S. servicemembers captured in Southeast Asia during the Vietnam War. The CIA produced thousands of responsive records "tending to shed light on the fates of prisoners of war and those men otherwise reported as missing in action during the Vietnam conflict," *Hall v. CIA*, 268 F. Supp. 3d 148, 159 (D.D.C. 2017). The agency did not initially search its operational files, citing the statutory exemption for such files in 50 U.S.C. § 3141. The district court ordered the CIA to search the operational files. The agency did so and provided two declarations describing the scope of its search. The court correctly found that the

agency's affidavits "contain[ ] detailed information about how this search was conducted," Dkt. No. 385, at 11, and that the search fully satisfied FOIA's requirements.

This Court should affirm the district court's grant of summary judgment for the CIA regarding the operational files search. The agency provided multiple declarations explaining that the operational files searched included cables, intelligence reports, and other records, and encompassed both hard copies and electronic versions of records. The CIA explained it that deliberately cast a wide net for responsive records by employing broad search terms like "POWs," "prisoners of war," "MIA," "Vietnam," and "different combinations and variations of those search terms." Dkt. No. 376-3, at 4. The district court correctly held that "agencies generally have discretion in crafting a list of search terms as long as they are reasonably tailored to uncover documents responsive to the FOIA request," and that the terms used by the CIA were "reasonably likely to have yielded the files sought by plaintiffs if they were indeed present in the CIA's operational files." *Id.*

Plaintiff places considerable reliance on declarations from former members of Congress asserting that they are aware of additional

relevant documents. On their own terms, the declarations provide no significant reason to conclude that the CIA's search failed to identify records within its operational files. In any event, "it is long settled that the failure of an agency to turn up . . . specific document[s] in its search does not alone render a search inadequate." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). This Court has recognized that "particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them," which is why courts judge the "adequacy of a FOIA search . . . not by [its] fruits . . . , but [rather] by the appropriateness of the methods used to carry out the search." *Id.*

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment on the adequacy of an agency's FOIA search de novo. *See Watkins Law & Advocacy, PLLC v. U.S. Dep't of Justice*, 78 F.4th 436, 442 (D.C. Cir. 2023).

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE CIA CONDUCTED AN ADEQUATE SEARCH OF ITS OPERATIONAL FILES

A. The CIA cast a broad net and used reasonable search terms in searching its operational files.

An agency is entitled to summary judgment in a FOIA suit if it "show[s] that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Watkins Law & Advocacy, PLLC v. U.S. Dep't of Justice*, 78 F.4th 436, 442 (D.C. Cir. 2023) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The agency "need not 'search every record system' or 'demonstrate that all responsive documents were found and that no other relevant documents could possibly exist.'" *Id.* (quoting *Oglesby*, 920 F.2d at 68). In assessing the adequacy of the search, this Court "may rely on a 'reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.'" *Mobley v. CIA*, 806 F.3d 568, 580-81 (D.C. Cir. 2015) (quoting *Oglesby*, 920 F.2d at 68). Agency affidavits, "so long as they are 'relatively detailed and non-

conclusory,'" are "accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Id.* (quoting *SafeCard Servs., Inc. v. Securities & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

In determining which search terms to employ in a records search, the government must only "show that its search efforts were reasonable and logically organized to uncover relevant documents; it need not knock down every search design advanced by every requester." *DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015) (citing *SafeCard Servs.*, 926 F.2d at 1201). Where the search terms are reasonably calculated to lead to responsive documents, courts should not "micro manage" the agency's search. *See Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) ("FOIA, requiring as it does both systemic and case-specific exercises of discretion and administrative judgment and expertise, is hardly an area in which the courts should attempt to micro manage the executive branch.").

The CIA provided detailed declarations explaining that its "information management professionals searched Agency records in operational file systems," which "included an exhaustive electronic and

hard copy search of Agency records." Dkt. No. 376-3, at 4; *see also* Dkt. No. 383-2. The CIA "searched centralized internal databases containing [a]gency-wide operational files, including cables, intelligence reports and other records." Dkt. No. 383-2, at 2-3. Operational files "originally maintained in hard copy form" were "digitized and made a part of these databases." *Id.* at 3. "Any database where operational files related to Plaintiff's request could reasonably have been located were searched in the course of this review." *Id.*

The CIA's declarations explained that the agency "cast a deliberately wide net for the requested records by employing broad search terms" in various combinations, including "POWs," "prisoners of war," "MIA," "missing in action," "Vietnam," "task force," "House Special POW," and "image." Dkt. No. 376-3, at 4; *see also* Dkt. No. 383-2, at 3. The search was not limited in time and was conducted to include records through the date of the search. Dkt. No. 376-3, at 4. The CIA's search generated potentially responsive records that were then reviewed by agency personnel to determine whether the records were actually responsive. *Id.* at 4-5. The CIA determined during this second

level of review that none of these records was actually responsive. *Id.* at 5.

Plaintiff urges that the CIA should have used additional, more specific search terms such as the names of individual servicemembers and the prisons in Southeast Asia in which they might have been placed. *See* Br. 17-26. But plaintiff does not explain why its additional suggested search terms are likely to yield more responsive records than the terms employed by the agency. To the contrary, as the CIA explained, "utilizing more specific search terms would not have necessarily been effective in identifying documents potentially responsive to Plaintiffs' request, and may have inadvertently excluded otherwise responsive documents that failed to contain the more specific search terms." Dkt. No. 383-2, at 3. The CIA reasonably concluded that any responsive records containing more specific terms would also include the broader terms listed above. *See* Dkt. No. 376-3, at 4; Dkt. No. 383-2, at 3. "Out of an abundance of caution, a broad search method was employed to properly capture all documents potentially responsive to Plaintiffs' request." *Id.* The search terms used by the agency were, as the district court explained, reasonably calculated to

find responsive documents if they existed. FOIA does not require "that every conceivable term, variant, or misspelling must be considered by an agency, as FOIA requestors are only 'entitled to a reasonable search for records, not a perfect one.'" *Inter-Cooperative Exch. v. U.S. Dep't of Commerce*, 36 F.4th 905, 911 (9th Cir. 2022).

B. The CIA described the search of its operational files in reasonable detail.

The district court correctly determined that the CIA adequately described the search of its operational files. Affidavits that "explain in reasonable detail the scope and method of the search conducted by the agency" are "sufficient to demonstrate compliance with the obligations imposed by the FOIA." *Morley v. CIA*, 508 F.3d 1108, 1121 (D.C. Cir. 2007) (alteration omitted) (quoting *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (per curiam)). An agency need not describe "with meticulous documentation the details of an epic search for the requested records." *Perry*, 684 F.2d at 127. Rather, a satisfactory affidavit will describe what files were searched, who performed the search, and the approach used in performing the search. *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980); *Mobley*, 806 F.3d at 581.

The CIA provided several declarations describing how "CIA information management professionals searched Agency records in operational file systems," including the two-level method they used to review potentially responsive records. Dkt. No. 376-3, at 4-5; Dkt. No. 383-2, at 2-3. As discussed, the declarations listed the search terms used and explained that these "broad" terms were used "[o]ut of an abundance of caution" to "properly capture all documents potentially responsive to Plaintiffs' request." Dkt. No. 383-2, at 3. The CIA further explained that the operational files searched included "cables, intelligence reports and other records," and clarified that its search encompassed "[a]ged operational files" that were "originally maintained in hard copy form" but "were digitized and made a part of [the relevant] databases." *Id.*

The decisions on which plaintiff relies confirm the adequacy of the explanations provided here. *See* Br. 28 n.32 (first citing *Morley*, 508 F.3d 1108; and then citing *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548 (D.C. Cir. 1994)). This Court held in *Morley* that the agency failed to describe its search adequately where the agency's affidavit "merely identifie[d] the three directorates that were responsible for finding

responsive documents without 'identifying the terms searched or explaining how the search was conducted' in each component." 508 F.3d at 1122 (alterations omitted). Nor did it "provide any indication of what each directorate's search specifically yielded." *Id.* Similarly, the affidavit found inadequate in *Steinberg* "fail[ed] to describe in any detail what records were searched, by whom, and through what process." 23 F.3d at 551-52. The CIA's affidavits here, by contrast, described how the agency searched its operational files, described the types of records included in those files, and listed the search terms used. *See* Dkt. No. 376-3; Dkt. No. 383-2.

Finding that the agency's description was "sufficient on its own merits," the district court also noted the "unique circumstances that further counsel ruling in favor of the CIA." Dkt. No. 385, at 11. This appeal involves the CIA's search of its operational files, which contain information documenting intelligence sources and methods. *See* 50 U.S.C. § 3141(a). Operational files "are the most sensitive of the CIA's records and, thus, the most likely to need an extra measure of protection." *Sullivan v. CIA*, 992 F.2d 1249, 1251 (1st Cir. 1993). Congress determined that operational files are generally exempt from

search, review, or disclosure under FOIA because the CIA "must necessarily operate substantially in secret" in protecting "information documenting intelligence sources and methods." H.R. Rep. No. 98-726, pt. 2, at 5-6 (1984). Any inquiry into whether the CIA explained its search "in reasonable detail," *Morley*, 508 F.3d at 1121 (quoting *Perry*, 684 F.2d at 127), should accordingly take the sensitive nature of these records into account.[2]

C. The district court correctly found that affidavits of former legislators regarding documents seen in the past cast no doubt on the adequacy of the search.

1. Plaintiff's challenge to the adequacy of the search places considerable reliance on declarations from former members of Congress attesting that they were shown or made aware of live-sighting reports, aerial or satellite images of POW camps, and reconnaissance or rescue operations related to Vietnam-era POW/MIAs. *See* Dkt. No. 83-15, ¶¶

[2] To the extent plaintiff contends that the CIA provided an insufficient *Vaughn* index regarding its operational files, *see* Br. 10, 30-31, it did not raise this issue below and therefore forfeited it. *See* Dkt. No. 377. In any event, the CIA did not produce a *Vaughn* index concerning the operational files search because it located no responsive records. *See Johnson*, 310 F.3d at 774 (explaining that agencies may provide a requester with a *Vaughn* index to describe responsive records withheld under a FOIA exemption).

8-9; Dkt. No. 95-45, ¶¶ 8-24. However, "it is long settled that the failure of an agency to turn up . . . specific document[s] in its search does not alone render a search inadequate." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (collecting cases). This Court has explained that "particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them." *Montgomery v. Internal Revenue Serv.*, 40 F.4th 702, 715 (D.C. Cir. 2022) (quoting *Iturralde*, 315 F. 3d at 315). "This is why [courts] judge the adequacy of a search not by its fruits, but rather 'by the appropriateness of the methods used to carry out the search.'" *Id.* (quoting *Iturralde*, 315 F.3d at 315).

While "a court may place significant weight on the fact that a records search failed to turn up a particular document" under "certain circumstances," *Iturralde*, 315 F.3d at 315, no such circumstances are present here. Plaintiff "does not maintain that the [CIA] failed to search particular offices or files where the document[s] might well have been found." *Id.* (citing *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999)). The CIA was instructed to search its operational files, and did so. And plaintiff "does not point to evidence

that would indicate that at the time the [CIA] searched its [operational] files there was reason to believe that the [additional records] w[ere] in those files." *Id.* Plaintiff states only that various additional records should have been found. This Court's "precedent makes clear, however, that even if this claim were true, the [CIA]'s search in this case was not inadequate, as it 'made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" *Montgomery*, 40 F.4th at 715-16 (quoting *Oglesby*, 920 F.2d at 68).

The circumstances here contrast sharply with those in *Valencia-Lucena*, 180 F.3d 321, cited by plaintiff, in which a Coast Guard search was inadequate because the Coast Guard's own submissions revealed "positive indications of overlooked materials." *Id.* at 327 (quoting *Founding Church of Scientology of Washington, D.C., Inc. v. National Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979)). The Coast Guard's declaration indicated that "the offices searched . . . were not the only places 'likely to turn up the information requested'" and that responsive records "may be located at the federal records center in Georgia." *Id.* (quotation marks omitted). This Court concluded that the government's

"failure to search the center it had identified as a likely place where the requested documents might be located clearly raises a genuine issue of material fact as to the adequacy of the Coast Guard's search." *Id.* Here, the district court ordered a specific search of the CIA's operational files and the CIA searched those files thoroughly, in "relevant systems of operational records that were reasonably calculated to find documents" amounting to "all relevant office databases likely to contain responsive records." Dkt. No. 376-3, at 4.

In any event, the affidavits provide no reason to question the adequacy of the search. Plaintiff's affidavits indicate that decades ago, former legislators were shown records relating to Vietnam-era POW's. *See* Dkt. No. 83-1, at 18; Dkt. No. 83-15, ¶¶ 8-9; Dkt. No. 95-45, ¶¶ 8-24. These affidavits do not show that the CIA currently possesses responsive records in its operational files. "[T]he fact that responsive documents once existed does not mean that they remain in the CIA's custody today or that the CIA had a duty under FOIA to retain the records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam).

The district court therefore properly concluded that "plaintiffs' evidence fails given the limited purpose here." Dkt. No. 385, at 8. The district court "specifically ordered a search of operational files," and "plaintiffs' evidence does not establish, or even significantly suggest," that a reasonable search should have located additional records. *Id.*

2. Plaintiff argues for the first time on appeal that the district court should have considered "the CIA's motives to withhold its records" in evaluating the veracity of the agency's declarations. Br. 32-34. Plaintiff failed to raise this argument in challenging the adequacy of the CIA's search of its operational files and therefore forfeited it. *See* Dkt. Nos. 377, 378; *Chichakli v. Tillerson*, 882 F.3d 229, 234 (D.C. Cir. 2018) (argument not raised below is forfeited).[3]

The argument is meritless in any event. Agency affidavits enjoy a "presumption of good faith," which will withstand "purely speculative claims about the existence and discoverability of other documents."

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[3] To the extent plaintiff argues (Br. 34-36) that the CIA (1) failed to comply with the disclosure requirement of Executive Order 12,812 and Presidential Directive NSC-8; (2) failed to comply with the declassification provisions of Executive Order 13,526; or (3) did not properly conduct its decennial review of operational files, these arguments were not raised below and are therefore not properly before this Court.

SafeCard Servs., 926 F.2d at 1200 (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981) (per curiam)). Plaintiff has pointed to no "evidence sufficient to put the Agency's good faith into doubt." *Ground Saucer Watch*, 692 F.2d at 771. Plaintiff acknowledges that "[o]ver the course of this case, the Agency has produced around 8,000 pages of records," Br. 36, which the district court found "shed light on the fates of prisoners of war and those men otherwise reported as missing in action during the Vietnam conflict." *Hall v. CIA*, 268 F. Supp. 3d 148, 159 (D.D.C. 2017). While plaintiff asserts (Br. 34-38) that certain records should have been released sooner, it identifies no evidence that "establish[es], or even significantly suggest[s]," that the CIA is withholding additional responsive records in its operational files. Dkt. No. 385, at 8.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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April 3, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,627 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Graham W. White
Graham W. White

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Graham W. White
Graham W. White

ADDENDUM

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50 U.S.C. § 3141 .... A1

Exec. Order No. 12,812 .... A5

50 U.S.C. § 3141. Operational files of the Central Intelligence Agency.

(a) Exemption by Director of Central Intelligence Agency

The Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of Title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

(b) "Operational files" defined

In this section, the term "operational files" means--

(1) files of the National Clandestine Service which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

(3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

except that files which are the sole repository of disseminated intelligence are not operational files.

(c) Search and review for information

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning--

(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of Title 5 (Freedom of Information Act) or section 552a of Title 5 (Privacy Act of 1974);

(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of Title 5 (Freedom of Information Act); or

(3) the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

(d) Information derived or disseminated from exempted operational files

(1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

(e) Supersedure of prior law

The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after October 15, 1984, and which specifically cites and repeals or modifies its provisions.

(f) Allegation; improper withholding of records; judicial review

Whenever any person who has requested agency records under section 552 of Title 5 (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure

to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of Title 5, except that--

(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;

(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

(3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

(4)(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of Title 5 by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the

court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of Title 5 (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

(g) Decennial review of exempted operational files

(1) Not less than once every ten years, the Director of the Central Intelligence Agency and the Director of National Intelligence shall review the exemptions in force under subsection (a) to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

(2) The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.

(3) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining the following:

(A) Whether the Central Intelligence Agency has conducted the review required by paragraph (1) before October 15, 1994, or before the expiration of the 10-year period beginning on the date of the most recent review.

(B) Whether the Central Intelligence Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.

Executive Order No. 12,812. Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action.

WHEREAS, the Senate, by S. Res. 324 of July 2, 1992, has asked that I "expeditiously issue an Executive order requiring all executive branch departments and agencies to declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POWs and MIAs;" and

WHEREAS, indiscriminate release of classified material could jeopardize continuing United States Government efforts to achieve the fullest possible accounting of Vietnam-era POWs and MIAs; and

WHEREAS, I have concluded that the public interest would be served by the declassification and public release of materials pertaining to Vietnam-era POWs and MIAs as provided below;

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. All executive departments and agencies shall expeditiously review all documents, files, and other materials pertaining to American POWs and MIAs lost in Southeast Asia for the purposes of declassification in accordance with the standards and procedures of Executive Order No. 12356.

Sec. 2. All executive departments and agencies shall make publicly available documents, files, and other materials declassified pursuant to section 1, except for those the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of returnees, family members of POWs and MIAs, or other persons, or would impair the deliberative processes of the executive branch.

Sec. 3. This order is not intended to create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.