NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. CIRCUIT NO. 22-5235
(C.A. No. 04-814)

ACCURACY IN MEDIA, INC., *Plaintiff-Appellant*,

v.

CENTRAL INTELLIGENCE AGENCY, *Defendant-Appellee*.

PAGE PROOF REPLY BRIEF FOR APPELLANT

On Appeal from the United States District Court for the District of Columbia, Hon. Royce C. Lambert, District Judge

---

John H. Clarke
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
john@johnhclarkelaw.com
Attorney for Appellant

TABLE OF CONTENTS

Table of Cases

Executive Orders and Presidential Directive

Other Authorities

APPELLANT'S REPLY BRIEF

COMES NOW Appellant, Accuracy in Media, Inc., and respectfully submits this Reply to the Brief of Appellee Central Intelligence Agency ("*Def. Brief*").

The CIA writes that the "question presented is whether the CIA conducted an adequate search of its operational files." *Def. Brief* at 2. While this is so, Defendant seeks to limit the scope of this Court's *de novo* review of the record below. This it cannot do.

1. THE ISSUE OF DEFENDANT'S MOTIVES FOR NONDISCLOSURE IS BEFORE THE COURT

The CIA seeks to limit the scope of this Court's analysis of Plaintiffs' enumerated issue of "[w]hether the District Court gave due weight to the CIA's motives to withhold its records that were generated after Operation Homecoming in 1973." Defendant claims, incorrectly, that Plaintiffs failed to raise the issue in the district court:

> 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).

Def. Brief note 2 at 24.

Defendant is mistaken. *See. e.g., Plaintiff Accuracy in Media's Motion to Reconsider the Court's November 30, 2020, Order and Judgment*, ECF No. 364 at 5, under heading *Motives for Withholding*:

> Here, every one of defendant's disclosures on the issue inculpates the government in knowingly abandoning its citizens—*An Enormous Crime*—as Rep. Billy Hendon aptly named his book. Another motive for withholding the records sought is the demoralizing effect it would have on the Armed Forces. *See, e.g., Hendon Aff.*, ECF 95-45 ¶ 18, quoting October 1992 speech by Deputy Assistant Secretary of Defense:
>
> > The basic lie is that the U.S. Government knowingly left Americans behind and is now covering up. If this lie lives, then it will tear at the guts of our military. If future Americans become convinced that their county won't stand behind them when the chips are down, then they won't stand on the front lines for their county.

See also Sanders Aff., ECF 258-2 ¶ 11 at 4-5, quoting Senate Foreign Relations Staff report, "An Examination of U. S. Policy Toward POW/MIAs," under the heading *Bureaucratic Motives*:

> On the record, the U.S. government has professed to give these concerns "the highest national priority." Off the record, this priority vanishes. Instead, other considerations emerge: Grand visions of a foreign policy of peace and reconciliation; desire for a new economic order of trade and investment; ideological imperatives to downplay the hostility of antagonistic systems; and the natural tendency of the bureaucracy to eliminate its workload by filing cases marked "closed" instead of finding the people.

And see, Plaintiffs Statement of Genuine Facts Not in Genuine Dispute ECF No. 258-8 ¶ 15, under the heading, *Motives for declaring dead*:

> Motives to declare that the POWs are dead include morale among DOD personnel (*Hendon Aff*. Docket 95-45 ¶ 62), to foster peace and reconciliation and trade and investment (*Sanders Aff*. ¶ 10), and to terminate pay (*Hrdlicka Aff*. ¶ 8). "What is really at risk are the reputations and careers of the intelligence officials who participated in and perpetrated this sorry chapter in American history." *Smith Aff*. ¶ 20.

The district court recognized Plaintiffs' motive argument in its November 23, 2021 *Memorandum Order*, ECF No. 375 at 2-3; "Plaintiff Accuracy in Media ('AIM') argues that the CIA has a motive to overclassify information and focuses primarily on the need to 'find out what happened' to missing prisoners of war. ECF No. 364 at 7."

2. THE CIA'S RECORD OF NONDISCLOSURES IS BEFORE THE COURT

The record below includes the decades-long history of calls for disclosure of information on unrepatriated POWs. Included are the 1992 Executive Order ("E.O") 12,812, E.O. 13,526, Presidential Directive NSC-8, as well as the Defendant's record of releasing records upon its decennial reviews that should have been released decades ago. Defendant erroneously avers that this greater context should be ignored because "these arguments were not raised below and are therefore not properly before this Court." *Def. Brief* note 3 at 28.

CIA claims that, when it began releasing records to Hall, it was complying with E.O. 12,812, which mandated "expeditious" review and release. However, the first production in this case was in 2010, 18 years after President Bush issued

that E.O. Moreover, had Defendant adhered to the E.O.s, or the Presidential directive, or employed the proper criteria in its decennial reviews, the 8,000 pages released in this case would have been released long ago.

The record of Defendant's recalcitrance in its disclosures is well-documented in this case. *See* Appellant's Brief at 33-38. Contrary to the CIA's view, this greater context is a relevant consideration for this Court.

3. PLAINTIFF'S PROOF OF OVERLOOKED MATERIALS IS BEFORE THE COURT

Plaintiffs' evidence of positive indications of overlooked materials is contained in eleven of the affidavits in the case, attaching a total of 230 exhibits.[1] In lieu of addressing any of Plaintiffs' evidence, the CIA disputes only Senator Bob Smith's affidavit, arguing that it alone is an insufficient showing of overlooked materials.

The CIA argues that "[t]he district court correctly found that affidavits of former legislators regarding documents seen in the past cast no doubt on the

[1] *Toll Aff*. ECF No. 83-1, *LeBoutillier Aff*. ECF No. 83-15, *Hendon Aff*. ECF No. 116-46 (11 Exhibits), *O'Shea Aff.* ECF No. 182-6 (2 Exhibits), *Hall Aff*. ECF No. 260 (148 Exhibits), *McDaniel Aff*. ECF No. 258-1 (1 Exhibit), *Sauter Aff*. ECF No. 258-3 (6 Exhibits), *Sanders Aff*. ECF No. 258-2, *Smith Aff*. ECF No. 258-4, *Hrdlicka* ECF No. 261-1 (53 Exhibits), *Hendershot Aff*. ECF No. 364-1.

adequacy of the search" (*id.* at 24), and reiterates this view throughout its Brief,[2] ignoring that the district court relied on Senator Smith's affidavit— "among other things."[3] Plaintiffs' evidence is vast, and encompasses much more than Appellant

---

[2] *Def. Brief* at 11-12, 14, 23-24, 35:
The district court rejected plaintiffs' argument that the affidavits from former members of Congress demonstrated that the search was inadequate. *** 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. *** Plaintiff places considerable reliance on declarations from former members of Congress asserting that they are aware of additional relevant documents. *** 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.

[3] *Mem. Order* ECF 340 at 3:

> But § 3141 does not categorically absolve CIA from searching its operational records… a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)—(B)… Plaintiffs do so here with—*among other things*—an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding documents that should be declassified;" and that "could and should be released as they pose no national security risk." *Aff. Bob Smith* ¶¶ 8, 20, ECF No. 258-4… CIA must review its operational files…
> (emphasis supplied)

cited in its Opening Brief.[4] The body of evidence is hardly "purely speculative claims about the existence and discoverability of other documents" under *SafeCard Servs., Inc. v. Securities & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), as the CIA claims.

Moreover, in 2019 the district court denied Defendant's dispositive motion because Plaintiffs had "pointed to several concrete examples that strongly suggest additional records do exist." Now, however, the analysis of the very same evidence of overlooked materials was held to be insufficient to defeat summary judgment. *See Mem. Op*. ECF No. 385 at 6-7, "These kinds of statements were

---

[4] Offer of proof on the issue of positive indications of overlooked materials, not cited in Appellant's Opening Brief, include the following from *Plaintiffs Statement of Genuine Facts Not in Genuine Dispute* ECF No. 258-8 ¶ 15, under the following headings: *Communist policy to hold back POWs* ¶ 4; *Paris Peace Accords* ¶ 5; *600 men not repatriated* ¶¶ 7, 10, 13; *US government to refusal to provide war reparations* ¶¶ 13-14; *Motives for declaring dead* ¶ 15; *Thousands of live sighting reports* ¶ 18; *Policy of withholding records* ¶ 19; *Criminal misconduct, cover-up* ¶¶ 24-26; *Secret military signals and codes and messages sent from POWs* ¶¶ 27, 30; *Other satellite imagery and photographs* ¶¶ 32, 34, 36-44, 46-48; *Offer to repatriate POWs for reward* ¶¶ 51-56; *Rescue operations* ¶¶ 59, 63; *Military Assistance Command, Vietnam—Special Operations Group* ¶¶ 66-69; *Nhom Marrott* ¶¶ 70, 72-74; *David Hrdlicka* ¶¶ 75, 78; *Other records not produced* ¶¶ 80, 82-91, 93-109; *Other records of POWs in Laos* ¶ 110; *Other records of specific operations and locations* ¶¶ 118, 120, 122-125; *Lists of prison sites* ¶¶ 126-127; *Additional records of POWs into the 1980s and 1990s* ¶¶ 128, 130, 135-138, 150-153; *POWs transferred to Russia, North Korea, China* ¶ 159; *CIA records* ¶¶ 160-172, 174, 176-179.

previously credited by the Court as 'positive indications of overlooked materials.' ECF No. 340 at 2 (quoting *Aguiar v. Drug Enf't Admin*., 865 F.3d 730, 738 (D.C. Cir. 2017))." The district court's explanation is that its 2019 ruling was in response to the CIA's *Glomar* assertion. However, the finding of positive indications of overlooked materials is irrelevant on the *Glomar* issue.

4. SEARCH TERMS

As an initial matter, the CIA's argument, quoting the district court, that "plaintiffs' evidence does not establish, or even significantly suggest, that the files referenced are in the CIA's current operational files," is misleading.

The statement should add the word "still." As there is no question that the records at issue were initially placed in the CIA's operational file repositories, the statement should be that the files "are *still* in the CIA's current operational files." Also, the records are either located in operational file repositories or they are not, while the use of the word "current" would suggest otherwise.

(a) Primary Next-of-Kin List

The Court mandated that the CIA use the names in conducting its search of repositories of non-operational records, but later—after the CIA was ordered to conduct a search of its operational file repositories—the district court relieved the CIA of that obligation. The only justification the district court gave was that

conducting a search of the 1,711 names on that list would be an arduous task, which is the same justification the district court had earlier rejected.

(b) Laos

Plaintiffs' FOIA Request No. 1 is:

> Southeast Asia POW/MIAs (civilian or military) and detainees, who have not returned, or whose remains have not been returned to the United States, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia.

ECF 114-1 at 10.

Southeast Asia includes Thailand, Cambodia, and, most relevantly, Laos. Here, the CIA saw fit to use "Vietnam" as a search term, but not Laos, even while around half of the evidence submitted by plaintiffs concerned Laos. Moreover, "all live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief" (*LeBoutillier Aff*. ECF No. 83-15 ¶ 12), and CIA actually ran the War in Laos, as Major General Richard Secord testified. *Hall Aff*. ECF No. 260 ¶ 119, quoting Exhibit 8 at Bates 32.

Defendant is silent on this issue.

(c) Rescue and Reconnaissance Operations

The CIA engaged in the planning, or execution, of at least 15 rescue and reconnaissance operations. Each operation had a code name. It would seem

rudimentary that the search terms utilized to locate these records would include the names of the operations.

5. DESCRIPTION OF SEARCH OF OPERATIONAL RECORDS

Aside from giving its perfunctory word that it searched an unknown number of relevant databases, and hard copy repositories, the only information that the CIA provides, aside from the search terms, is that the electronic search yielded an unknown number of hits ("a few"), and that it located no responsive records whatsoever. In sum, the CIA simply declared that it conducted a proper search. This is not enough.

Plaintiffs have located no authority for the proposition that a *Vaughn* index regarding the search of operational records need not include the same information as required for a search in its non-exempt file repositories.

The CIA and the district court treat the CIA's obligation to report on its search as being less fulsome than its search of non-operational files. While such a conclusion might be justified, there is no analysis whatsoever of why this is so. This question should be remanded to develop a record upon which this issue was decided.

CONCLUSION

If a review of the record "raises substantial doubt," as to a search's adequacy, "particularly in view of 'well-defined requests and positive indications of

overlooked materials,'" summary judgment would not be appropriate. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Founding Church of Scientology v. Nat'l. Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979).

Plaintiffs have far exceeded their burden of demonstrating positive indications of overlooked materials. The absence of identification of responsive records is so wide-ranging as to be "highly probative of the inadequacy of the government's search" under *Aguiar v. Drug Enf't Admin*., 865 F.3d 730, 738 (D.C. Cir. 2017

WHEREFORE, Appellant Accuracy in Media, Inc., prays that this Court remand this case with instructions for the CIA to:

A. Conduct additional searches of both its operational and non-operational file repositories, employing search terms that includes:
   (1) Laos;
   (2) The 1,711 names appearing on the POW/MIA list;
   (3) The code names of reconnaissance or rescue operations; and
   (4) Prisons known to house POWs;

B. Submit a Declaration to include:
   (1) Whether it searched repositories of records otherwise exempt from search as operational files;
   (2) Whether it searched repositories of records likely to contain communications with other agencies and offices identified by Plaintiffs; and
   (3) A fulsome description of its search.

Date: May 8, 2024.

Respectfully submitted,

/s/ John H. Clarke

John H. Clarke Bar No. 388599
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
john@johnhclarkelaw.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE FRAP 27(d)(2)(A)

The text for this Brief for Appellant was prepared using Times New Roman, 14 point, and contains 2,364 words as counted by Microsoft Word.

/s/ John H. Clarke
John H. Clarke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2024, I have caused the foregoing *Appellant's Reply Brief* to be served on Appellee's counsel by filing the Certificate on the Court's CM/ECF system. Counsel is a registered user.

/s/ John H. Clarke
John H. Clarke