

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-814 (RCL)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

PLAINTIFF ACCURACY IN MEDIA'S CROSS MOTION FOR ENTRY
OF SUMMARY JUDGMENT IN ITS FAVOR, AND OPPOSITION TO
DEFENDANT CIA'S MOTION FOR ENTRY OF SUMMARY JUDGMENT

COMES NOW plaintiff Accuracy in Media, Inc. ("AIM"), by counsel, and respectfully moves this Court, under Rule 56 of the Federal Rules of Civil Procedure, for entry of summary judgment in its favor, and in opposition to defendant CIA's motion for summary judgment.

In support of this relief, plaintiff submits its attached memorandum, together with *Plaintiffs' Statement of Facts*, *Plaintiffs' Response to Defendant's Statement of Facts*, the affidavits of Captain Eugene B. McDaniel, U.S. Navy (Ret) (ECF 258-1), James Sanders (ECF 258-2), Mark Sauter (ECF 258-3), Bob Smith (ECF 258-5), Roger Hall (ECF 260), Carol Hrdlicka (ECF 261-1), Bill Hendon (ECF 116-46), John LeBoutillier (ECF 83-15), Larry J. O'Daniel (ECF 116-45), and Lynn O'Shea (ECF 186-2).

Additionally, AIM relies on the grounds and authorities submitted by co-plaintiffs Roger Hall and Study Solution Results, Inc.

DATE: December 14, 2018.

Respectfully submitted,

/s/

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PLAINTIFF ACCURACY IN MEDIA'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION
TO CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Accuracy in Media, Inc., by counsel, under Rule 56 of the Federal Rules of Civil Procedure, and respectfully submits this memorandum in support of its motion for entry of Summary Judgment in plaintiffs' favor, and in opposition to defendant Central Intelligence Agency's Renewed Motion for Summary Judgment.

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I. Operational Designations

The CIA Information Act authorizes operational files from certain CIA components (the Directorate of Operations [DO], the Directorate of Science and Technology [DS&T], and the Directorate of Administration, Office of Security [now the Office of Personnel Security (OPS) and the Office of Security Operations]) to be designated by the Director of Central Intelligence (DCI) as exempt from the search and review requirements of the Freedom of Information Act (FOIA). The Act also requires that not less than once every 10 years, the DCI review the exemptions then in force to determine whether such exemptions could be removed from any category of exempted files or any portion of those files.

May 11, 1995, CIA letter to Senate Select Committee on Intelligence, attached as Exhibit 1.

The CIA Act requires the CIA to review the exempted files every ten years to determine whether they can be removed from the exempted designations, on the basis of "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." 50 U.S.C. § 3141(g)(2).

The Court ordered the CIA to justify nondisclosure of aged records of 1,400 live sighting reports, imagery, and reconnaissance and rescue operations.

For example, in addition to the CIA's failure to turn-up files on 1,700 of the names of reported missing persons that it searched for, plaintiffs present 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.

August 3, 2017, Memorandum Opinion ("*Mem. Order*") ECF 291 at 15.

The Court held that the CIA had "fail[ed] to demonstrate how such dated records can reasonably be considered operational under the statute." *Id.*:

Although specific imagery, intelligence reports, and operations, even those more than 60 years old, may well still be classified, the Court cannot be left to speculate about whether such records, if they exist, are among those the CIA

Director has designated as operational files pursuant to his statutory authority. *See* Def Reply and Opposit'n [272] at *12 (representing that plaintiffs "have identified only the [a]gency's operational files" in their argument that the CIA's search has been inadequate). And, although the Court is strongly inclined to defer to the CIA's determinations as to classification and Section 3141, the present record fails to demonstrate how such dated records can reasonably be considered operational under the statute.

The Court reiterated at the status hearing on August 21, 2017, ECF 292 at 6-7:

The other concern I had was 60 years later, I don't really know why there would still be these materials in operational files. I take it you have to provide a report, and don't you provide the report to Congress every 10 years of what are operational files? So maybe I would be more satisfied if I saw the latest *in camera* or whatever way explanation of what's still operational and what's not operational.

See also status hearing on September 26, 2017, ECF 293 at 9:

MR. CLARKE: Also, Your Honor, the Court mentioned that some of these records that are 60 years old, the Court did not see any reason why, or wanted an explanation as to why they would still be an operational file. So I would ask that the Government's affidavit include that also.

THE COURT: It better. I already said I don't see a basis for it, so we'll see what they say. I expressed my view.

The CIA posits that it has long since determined which records are to remain operational, and exempt from search. This is not so. Defendant must either explain why aged records of, *inter alia*, the 1,400 live sighting reports, imagery of suspected camps, and reconnaissance and rescue operations, are still operational, or conduct the search. The government agreed to do so:

MR. TAAFFE: In terms of the item five documents which have to do with this P-N-O-K, or PNOK list, the age of the documents in question is considered in the decennial review, and it has been considered in each of those decennial reviews, and we can explain that in a declaration that we would file pursuant to a renewed summary judgment motion. It should be pretty straightforward.

Status hearing, Sept. 26, 2017, ECF 293 at 5.

(a) 1,400 live sighting reports

According to the Senate Select Committee's 1993 Report (at 178), "[t]he total number of first-hand and hearsay live sighting reports and other related reports is more than 15,000 since 1975." The Senate had access to at least 1,400 first-hand reports, and as many as 2,000 second-hand reports. Item 4 of plaintiffs' 2005 FOIA Request is for "Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing." ECF 114-1 at 10.

In 2015, defendant produced 33 documents associated with post-Operation Homecoming live sighting reports. Many concern Laos. Air Force General Richard Secord had been detailed to the Central Intelligence Agency for duty in the war in there. When asked who was the dominant collector of information in Laos, he replied, "CIA, clearly, because of the resources they had on the ground." *Plaintiffs' Statement of Material Facts*, Oct. 21, 2016, ECF 258-5 ¶ 173. Ambassador to Laos William Sullivan testified:

The CIA was in charge of the war [in Laos], not the military. The military helped out a little bit on the side, particularly through the provisions of air assets, but the military had very few people on the ground except for forward air controllers, which were very good, and some air attaches, whereas the Central Intelligence Agency had several hundred people on the ground in Laos.

Id.

"[I]n both Bangkok and Vientiane all live sighting reports that came into the embassy went directly to the CIA Station Chief." *LeBoutillier Aff.*, ECF 83-13 ¶12. This circumstance is among matters that CIA has not yet addressed, as plaintiffs observed at

both status hearings.¹ See also *Plaintiffs' Statement of Material Facts*, Oct. 21, 2016, ECF 258-5 ¶ 122:

The CIA has not stated that it searched any overseas field stations for responsive records. Witnesses before the Select Committee testified repeatedly to the involvement of CIA field stations in Vietnam, Laos, Cambodia, and Thailand, in the gathering of information about POW/MIAs...

(b) Imagery

Mem. Order, ECF 291 at 17:

For example, the plaintiffs submitted affidavits from certain former congressmen and senators that make it abundantly clear to the Court that, at some point, these individuals were shown imagery of possible POW camps that plaintiffs say has not been produced to them. The CIA has not addressed why that might be. To be clear, as with Item 5, what is troublesome is not necessarily *that* the CIA has not produced in this litigation certain information that may be exempted from disclosure, but that the CIA has failed to squarely address plaintiffs' evidence strongly indicating that the agency does possess the information sought.

In 1992, a 1988 satellite photograph of an Air Force escape and evasion code in Laos was made public, and appeared in *US News & World Report*. It also appears on the cover of

¹ Status hearing transcript August 21, 2017, ECF 292 at 8-9:
MR. CLARKE: Your Honor, briefly. Other than what's been discussed, I would just ask, is the Government going to be required to file an affidavit regarding the search for the 1,400 live sighting reports? I think that their affidavit was deficient in that area.
MR. TAAFFE: I think this falls into the category of the things Your Honor wanted clarification on. So to the extent we're filing a declaration with respect to other things, it would also deal with those in some manner.

Status hearing transcript Sept. 26, 2017, ECF 293 at 8:
MR. CLARKE: Yes, Your Honor. I would just suggest that the Government's affidavits include its search regarding the imagery that was mentioned in the Court's order and also the 1,400 live sighting reports. We've gotten none of those. So I would just hope that the affidavits would include those.
THE COURT: Okay.

the book, *An Enormous Crime, The Definitive Account of American POWs Abandoned in Southeast Asia*, by Former U.S. Rep. Billy Hendon (R-NC) and Elizabeth A. Stewart.

In 2008, when Mr. Hendon wrote his declaration, it was the "[o]nly one of the several known postwar satellite images/photographs showing valid USAF/USN Escape and Evasion codes, secret authenticators and/or the names of missing Pilots and/or crewmen laid out or constructed on the ground in northern Vietnam and/or Laos [that] has ever been declassified and released to the public." *Hendon Aff.*, ECF 95-45 ¶ 24. (The photograph was not, however, "declassified and released to the public." Rather, it was leaked.)

According to the Senate Select Committee's 1993 Report, at p. 200, "These possible distress symbols, several of which match pilot distress symbols used during the war, span a period from 1973 to 1988, and as late as June 1992."

These secret distress symbols are compelling. And they are unassailable, as the Select Committee observed at its hearing on October 15, 1992.

- KERRY: There is no trained person that has yet determined them to be a symbol, Senator. I will not be a party to falsely raising hopes. There are no symbols that have yet been determined to be a person made symbols that are in front of the committee. That is just a fact. I do not know why we are struggling with this unless it is of great interest to have everybody hyped up over some imaginary symbols
- SMITH: Well, let each Senator speak for himself, Mr. Chairman. I do not agree with that conclusion. I think the evidence is very compelling. I think the laws of probability would indicate to you that if there are series of numbers that identify with an individual or individuals who are missing in action in Southeast Asia and those numbers correlate with individuals, the laws of probability would tell you that in a very high probability that those people are in fact, identified with those numbers.

(c) Reconnaissance and rescue operations

A proper search would yield records on, *inter alia*, the many records of "named reconnaissance and rescue operations alleged to have taken place." *Mem. Order*, ECF 291 at 15. For examples, the CIA withholds records on *Sage Brush I* and *Sage Brush II*, code names for rescue attempts using CIA paid and trained Provincial Reconnaissance Units. *Plaintiffs' Statement of Material Facts*, Oct. 21, 2016, ECF 258-5 ¶ 61. Defendant withholds records on *Operation Thunderhead*, a 1972 White House-approved escape plan from the "Hanoi Hilton." *Id.* ¶ 62. It withholds records concerning *Operation Pocket Change*, the planned rescue of POWs held in Laos, and the 1972 *Son Tay* raid, a plan to try to rescue up to 60 POWs held in Laos, but cancelled because of the then pending Peace Agreement. *Id.* ¶ 65.

Disclosure would reveal a wealth of information on David Hrdlicka. *Duck Soup* was a CIA run attempt to rescue him. There was a "raft of CIA cables" concerning Hrdlicka, and a June 1990 report on his sighting. *Id.* ¶¶ 57, 59.

There is a great deal of intelligence regarding multiple reconnaissance and rescue attempts at a POW camp near Nhom Marrot, Laos, including a 1981 attempt, preceded by an inter-agency meeting that included the CIA. *Id.* ¶¶ 63, 64. *See also id.* ¶ 71:

The Central Intelligence Agency (CIA) holds never released documents relating to American servicemen Prisoners of War and Missing in Action in Southeast Asia, and at least one camp believed to hold these servicemen after March 1973. During the period March 1979-June 1981, the CIA gathered intelligence, including human intelligence reporting, and imagery of a prison camp located in the Nhom Marrott District of Khammouane Province Laos. According to intelligence reports approximately 18- 30 American Prisoner of War were held at this camp from September 1980-May 1981 and perhaps beyond. Between January and May 1981 the CIA dispatched a least one reconnaissance team to the camp location to photograph the inmates and gather intelligence. The CIA continues to withhold information on the preparation for the mission, team progress reports, photographs taken at the camp and the debriefing of reconnaissance team members. *O'Shea Aff.* Docket 182-6 ¶¶ 1-2.

Nor has the CIA disclosed any information on Operation Blackbeard, Oak, Nantucket, Vesuvius One, Sunstune Park, Gunboat, Bright Light, Project Alpha, or Project Corona. *Id.* ¶ 115.

Defendant has released no records of the activities of the *Military Assistance Command Vietnam, Studies and Observations Group*, which routinely used CIA trained mercenaries to insert into Laos for reconnaissance on the "second-tier POW camp system." *Id.* ¶ 58. The CIA has a large volume of records on its mercenaries, in its "indigenous personnel" files, also known as "Controlled American Source" files (*id.* ¶ 65), so a sufficient *Vaughn* index would address its search of those records.

A search is inadequate when it is "evident from the agency's disclosed records that a search of another of its records system might uncover the documents sought." *Valencia-Lucena*, 180 F.3d at 326.

II. Decennial Review

Defendant has provided no information whatsoever, *in camera* or otherwise.

Rather, it simply declared that, "[i]n its most recent decennial review, the validation team determined which records, including those containing imagery, held in designated operational files should continue to have that designation." *CIA Renewed Motion for Summary Judgment*, ECF 295-1 at 6. That is as specific as the CIA has been. No regulations, no procedure, no assessment of public interest, no attempt to vindicate its withholding of the aged records, as the Court ordered.

(a) Subject to Judicial Review

The CIA Act itself requires the CIA to review the exempted files at least every ten years to determine whether they can be removed from categories of exempted files, on the

basis of "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." 50 U.S.C. § 3141(g)(2). Subsection (g) authorizes a complainant to seek review in a United States District Court for the CIA's failure to conduct the required review by October 15, 1994, and before the expiration of each ten year period thereafter, and to review whether the CIA considered the "public interest" criteria. *Id.* § 3141(g)(3).

The CIA would ignore 50 U.S.C. § 3141(g)(2). "This FOIA case does not present a vehicle in which to collaterally attack the CIA's decennial review." *CIA Opposition to Motion for Stay*, ECF 300 at 2.

The CIA simply asserts that it reviewed, and disclosed, all non-exempt records upon its conclusions of the decennial reviews in 1995, 2005, and 2015, as well as earlier, in response to a 1993 Executive Order.²

However, the Court ruled that such a pronouncement is not the end of the matter. "[T]hat the CIA conducted a decennial review of its operational files in 2015, *2d Shiner Dec.* at §§ 17-20, is a threshold matter; it is not the end of the inquiry before the Court." September 22, 2018 *Mem. Order*, ECF 292 at 22.

² Status hearing transcript Aug. 21, 2017, ECF 292 at 5:
MR. TAAFFE: And the Agency is a little bit—just not quite sure what more it needs to do. And without being—or intending to be argumentative about it, they have conducted the decennial reviews of the ops files, and any information that was declassified pursuant to those reviews has been searched and processed in response to these requests, and the prior declarations explain how that was done.... And in 1992 or 3, there was an order calling for declassification of POW materials.

Because the CIA failed to disclose its basis for its operational categorizations, as ordered, on January 3, 2018, plaintiffs filed their *Motion for Stay*, attaching interrogatories propounded to defendant, ECF No. 297-1, seeking an explanation of the process in assessing the historical or other public interest value in decennial reviews.³

(b) Absence of regulations

Plaintiffs complained about the absence of the decennial review regulations at the Status hearing transcript Sept. 26, 2017, ECF 293 at 7:

MR. LESAR: With respect to the decennial review, the Court instructed that certain regulations and decisions be provided, and apparently we are not even going to get the regulations now without it being litigated as a separate

³ *Plaintiffs' Interrogatories to CIA*, ECF 297-1:

Interrogatory No. 1. Please explain all steps in the process employed by the CIA in its 2015 Decennial review to determine whether post-1973 Operation Homecoming records of US POWs in Laos and Vietnam should remain designated as operational files.

Interrogatory No. 2. Regarding the CIA's 2015 decennial review of otherwise responsive records that remain designated as operational (responsive and withheld),

- (1) Explain the government's assessment of the historical or other public interest value in the records, or portions of those records;
- (2) Explain each factor, and the weight assigned to it, for the decision to continue withholding the information, including especially the impact of the passage of time; and
- (3) State the government's position on the potential for declassifying a significant part of the information contained in those records. Include in your Answer an explanation of each factor, and the weight assigned to it, for the decision to continue operational categorization of
 - (a) 1,400 live sighting reports;
 - (b) Suspected prison camps; and
 - (c) Named reconnaissance and rescue operations.

Interrogatory No. 3. With regard to the disclosure of the attached *June 1975 CIA Intelligence Report*, released after the CIA's 2015 decennial review, and attached in Exhibit A at Bates 360-61, state in detail each of the factors considered in making the determinations to continue the alleged operational status of such record or portions thereof, upon completion of the decennial reviews in 1985, 1995, and 2005.

issue. It would've been very helpful to have them before we go to a briefing schedule.

(c) No description of database

Nor has the government provided any description of the organization of the records said to have been reviewed *five* times, most recently in 2015, for possible declassification. The sum total of information provided is that these records are organized into an unknown number of categories—neither named nor described—and that the categorized records are further divided into an unknown number of subcategories, also unidentified and undescribed. The CIA avers that it "cannot provide additional detail about the designated file series in an unclassified setting, [but] I can assure the Court that they are carefully and tightly defined to ensure that they serve the specific operational purposes." *CIA Motion for Summary Judgment*, Jan. 30, 2017, ECF 271 at 4, citing *Shiner Decl.*, ECF 271-1 ¶ 17. A description of any search here would not be complete absent some description of the organization of the databases.

(d) Age of records

Mem. Order, ECF 291 at 15.

Although specific imagery, intelligence reports, and operations, even those more than 60 years old, may well still be classified, the Court cannot be left to speculate about whether such records, if they exist, are among those the CIA Director has designated as operational files pursuant to his statutory authority. *See* Def Reply and Opposit'n [272] at *12 (representing that plaintiffs "have identified only the [a]gency's operational files" in their argument that the CIA's search has been inadequate). And, although the Court is strongly inclined to defer to the CIA's determinations as to classification and Section 3141, the present record fails to demonstrate how such dated records can reasonably be considered operational under the statute.

The standard of review is, in part, a function of the age of the document. The CIA's burden to justify nondisclosures for more than 25-year-old records is heightened. Where records are more than 50 years old, the CIA's burden is more onerous.

Section 3.3(a) of E.O. 13526 provides for the automatic declassification of records or information more than 25 years old. While this period may be extended, it is subject to a considerably higher test for showing the damage to national security required to continue classification. Thus, §3.3(b) of E.O. 13526 provides that an "agency head may exempt from automatic declassification . . . specific information, the release of which should clearly and demonstrably be expected to" reveal certain kinds of information. (Emphasis added). The CIA fails to set forth "clear" and "demonstrable" evidence that national defense or foreign policy will be damaged in any way by the disclosure of the records at issue. Here, claims of damage to national security are in categorical, boilerplate. It has proffered no information on relevant considerations, such as whether intelligence sources are living, or have otherwise been identified in the decades since the report was filed, forty years after the fact. In sum, what concerns warrant continuing protection for information on intelligence methods and activities from such aged records.

In 1992, when the whistleblower disclosed the 1988 satellite image of an escape and evasion code in Laos, it appeared on the cover of *US News & World Report*,⁴ and was

⁴ See *Hrdlicka Aff.*, ECF 261-1 ¶ 17. "In 1992, US News & World Report published an article on 1988 satellite imagery, USA walking 'K,' taken in the Sam Neua area, where David [Hrdlicka] was held. The government should have notified me. But I had to read about it in the magazine."

featured on NBC Dateline.⁵ That was the most recent intelligence disclosed.

The CIA's burden to continue to classify aged operational records is codified. But, the more recent the intelligence, the greater the public interest. *See, e.g.*, Wikipedia's description of a 2013 documentary.

Unclaimed is a 2013 Canadian documentary film about a man who claims to be former Special Forces Green Beret Master Sgt. John Hartley Robertson, who was declared dead after being shot down over Laos on a classified mission on 20 May 1968. The documentary is written, directed, and produced by Michael Jorgensen. It follows Tom Faunce, a veteran of the Vietnam War, in tracking down the man who claimed to be Robertson. Faunce was skeptical of Robertson's identity but eventually became convinced. He convinced Jorgensen to make a documentary about Robertson's story as a way to unite the man with his American family. He was

⁵ On October 6, 1992, NBC Dateline segment. *Id.* at 452-53:

SCOTT: (Voiceover) DATELINE has obtained this computer-enhanced photograph, taken by an American spy satellite in January, 1988, in a rice paddy in Northern Laos, the letters U-S-A are clearly distinguishable. But what is chilling to some Pentagon analysts is the symbol below. (Document showing rudimentary U-S-A spelling)

* * *

MR. HENDON: And I have talked to the people in charge of the compartmented program, that—that deals with the escape and evasion symbol that was in the satellite photography. And they say "Hey, no question. That's an American flier."

SCOTT: This is list of distress signals American flyers were told to display on the ground if shot down...

MR. HENDON: That can only be a US pilot telling you, "Get me out of here." That's all it can mean.

SCOTT: And he's saying that in January of 1988?

MR. HENDON: Absolutely.

* * *

SCOTT: You were given the same kinds of distress codes.

SENATOR MCCAIN: Yes, we were.

SCOTT: When you see this K, the walking K, doesn't that catch in your throat a little bit?

SENATOR MCCAIN: Oh it caught in my throat enormously. I would say [though] that my experience and knowledge of prison camp is that the guards do not generally allow prisoners to go out and stamp out U-S-A in large letters so that it can be photographed [by] satellite or by airplane. That's not their habit.

captured and tortured but survived and went on to build a new life, according to a startling documentary.

"Jorgensen said a government source told him, 'It's not that the Vietnamese won't let him (Robertson) go; it's that our government doesn't want him.'" *Id.*

Responsive records would likely include the records regarding the Robertson matter.

In 2016, President Obama told Laotian people that he was "pleased that, as a result of this visit, we will increase our efforts and bring more of our missing home to their families in America."⁶ Responsive records would include the records upon which the CIA's brief to the President was based. That would include intelligence gathered after the photograph was taken in 1988, into the 1990s, and likely well into this century.

In addition to seeking the information that the Court ordered the CIA to produce, plaintiffs' Interrogatories, ECF 297-1, add one more item. "What happened to David

⁶ The only visit to Laos from an American president was Barak Obama, on September 6, 2016, at the Lao National Cultural Hall, Vientiane, Laos. His remarks included:

I realize that having a U.S. president in Laos would have once been unimaginable. Six decades ago... the U.S. government did not acknowledge America's role. It was a secret war, and for years, the American people did not know. Even now, many Americans are not fully aware of this chapter in our history, and it's important that we remember today. Over nine years—from 1964 to 1973—the United States dropped more than two million tons of bombs here in Laos—more than we dropped on Germany and Japan combined during all of World War II. It made Laos, per person, the most heavily bombed country in history.

* * *

I thank the government and the people of Laos for your humanitarian cooperation as we've worked together to account for Americans missing in action. And I'm pleased that, as a result of this visit, we will increase our efforts and bring more of our missing home to their families in America.

Hrdlicka?" Carol Hrdlicka *and* the public would be keenly interested in defendant's records answering that question.

(e) Policy of nondisclosure

The United States and Hanoi entered into preliminary peace talks in Paris in 1969. They stalled, for three-and-a-half years, and the Accord was finally signed on January 27, 1973, and only after President Nixon's so-called "Christmas bombing"—a 12-day campaign of nearly 2,000 sorties dropping 35,000 tons of bombs, the most concentrated bombing in world history.

Given historic communist policy of withholding POWs at wars' end,⁷ Mr. Kissinger's promise of \$3.25 billion in reparations,⁸ the Nixon Administration would appear to have

⁷ *Sanders Aff.*, ECF 258-2, ¶ 4 quoting 1991 Senate Foreign Staff Report, *An Examination of U. S. Policy Toward POW/MIAs*:

Moreover, the Vietnamese, as Communists, have had the additional benefit of the experience of other Communist regimes in dealing with the United States and European powers. Therefore, it is not surprising to learn that the problems which the United States has had in dealing with prisoners of war and the missing in action are not the result of chance, but of historic Communist policy. Indeed, history reveals that policy. In the years after World Wars I and II, the Soviet regime, and later their North Korean cohorts, held American soldiers and citizens captive in the aftermath of these wars.*** The fact is that Soviet and Asian Communist regimes view POW/MIAs, living or dead, not as a problem of humanitarian concern but as leverage for political bargaining, as an involuntary source of technical assistance, and as forced labor. There is, therefore, no compelling reason in Communist logic to return POWs, or their remains, so long as political and economic goals have not been met.

1991 Senate Foreign Relations Staff Report: <http://www.aim.org/pdf/Hall-CIA/An-Examination-of-US-Policy-Toward-POW-MIAs-USSenate-1991-105-pages.pdf>.

⁸ *Id.*, quoting Henry Kissinger's February 1, 1973 letter to North Vietnamese, memorializing parties' agreement that "the United States of America will contribute to postwar reconstruction in North Vietnam without any political conditions... in the

known that not all Americans would be coming home, well before it was confirmed when Vietnam released the lists of POWs.⁹ *See, e.g., Smith Aff.* ECF 258-4 ¶ 2:

On January 17, 1973, the Paris Peace Accords were signed by the United States, South Vietnam, Viet Cong and North Vietnam. They were touted as "An Agreement Ending the War and Restoring Peace in Vietnam." The agreement did not, however, end the war and restore the peace for the hundreds of POWs and MIAs who were not returned from the war, for their families, who have waited for decades for answers, nor for the tens of thousands of South Vietnamese who were murdered or imprisoned in "reeducation camps" in the North. "All of our American POWs are on the way home" said Richard Nixon shortly after the signing.

"What President Nixon did not tell the American people and the families of the missing was that the American government had numerous classified documents and human intelligence that men were, in fact, still alive in Southeast Asia." *Id.* In plaintiffs'

range of \$3.25 billion of grant aid over five years." *Sanders Aff.* ¶ 6. "Dr. Kissinger's letter would not become public for another four years." *Id.*

⁹ *See, e.g., Wash. Post, Nixon Knew of POWs, Aids Say*, Sept 22, 1992:

Just six days earlier, Admiral Thomas Moorer, chairman of the Joint Chiefs of Staff, had ordered a halt to the U.S. troop withdrawal because North Vietnam had not given a full accounting of the prisoners. But the order was rescinded overnight.

* * *

...Senate testimony yesterday from former defense secretaries James R. Schlesinger and Melvin Laird and other Nixon-era officials, tended to confirm that Nixon and his top aides had strong evidence that some Americans were left behind, probably in Laos, when the war ended.

(https://www.washingtonpost.com/archive/politics/1992/09/22/nixon-knew-of-pows-aides-say/15496bd4-f8c5-4c5b-af96-3c156fcdfe2f/?noredirect=on&utm_term=.94b2acbd136d)

view, Nixon's pronouncement 45 years ago that "all of our American POWs are on the way home" is the genesis of the government's policy.¹⁰

¹⁰ See, e.g., *Hrdlicka Aff.*, ECF 261-1 ¶ 51, quoting 1992 resignation letter of Colonel Millard Peck, Chief, Special Office for Prisoners of War and Missing in Action (ECF 261-6 at 19-20):

My plan was to be totally honest and forthcoming on the entire issue and aggressively pursue innovative actions and concepts to clear up the live sighting business, thereby refurbishing the image and honor of DIA.***

From my vantage point, I observed that the principal government players were interested primarily in conducting a damage limitation exercise... The sad fact, however, is that this issue is being controlled and a cover-up may be in progress.***

Although assiduously "churning" the account to give a tawdry illusion of progress, she [Director of the National League of Families] is adamantly opposed to any initiative to actually get to the heart of the problem, and, more importantly, interferes in or actively sabotages POW-MIA analyses or investigations.... She apparently has access to top secret, code word message traffic, for which she is supposedly not cleared, and she received it well ahead of the DIA intelligence analysts.... She was brought from the "outside," into the center of the imbroglio, and then, cloaked in a mantle of sanctimony, routinely impedes real progress and insidiously "muddles up" the issue. One wonders who she really is and where she came from.... As the principal actor in the grand show, she is in the perfect position to clamor for "progress," while really intentionally impeding the effort. And there are numerous examples of this.***

I feel strongly that this issue is being manipulated and controlled at a higher level, not with the goal of resolving it, but more to obfuscate the question of live prisoners, and give the illusion of progress through hyperactivity. From what I have witnessed, it appears that any soldier left in Vietnam, even inadvertently, was, in fact, abandoned years ago, and that the farce that is being played is no more than political legerdemain done with "smoke and mirrors," to stall the issue until it dies a natural death.* * *

For all of the above, I respectfully request to be relieved of my duties as Chief of the Special Office for Prisoners of War and Missing in Action.... I further request that the Defense Intelligence Agency, which I have attempted to serve loyally and with honor, assist me in being retired immediately from active military service.

Other considerations, endemic to bureaucracies, including a reduced work load, also contribute to the government's policy.¹¹

Moreover, a major concern to the government is that full disclosure would have an adverse effect on the morale of the United States armed forces.¹²

(f) History of nondisclosure

Defendant's perfunctory proclamation that it adhered to various legislative and Executive directives mandating disclosure is plainly false. The veracity and thoroughness of the CIA's declarations should be evaluated in the greater context.

(i) 1982—Executive Order 13526

CIA asserts that "the Agency properly considered the appropriate procedural and substantive requirements of Executive Order 13526, which governs classification. *See Supp.*

¹¹ *See Sanders Aff.*, ECF 258-2 ¶ 11, quoting 1991 Senate Foreign Staff Report, *An Examination of U.S. Policy Toward POW/MIAs*:

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.

¹² *Hendon Aff.* ECF 95-45 ¶ 18, quoting 1992 speech by Deputy Assistant Secretary of Defense:

Today is a day we recognize our POWs and MIAs... and over 2,000 from Vietnam. Today I want to talk about one very basic truth about those Americans unaccounted for, and I want to talk about one very basic lie. The basic truth is this: Your government, from the President of the United States on down is fully committed to accounting for these Americans.... If this lie lives, then it will tear at the very guts of our military. If future Americans become convinced their country won't stand behind them when the chips are down, then they won't stand on the front lines for their country.

Shiner Decl. ¶ 3. Specific clarifications follow." *CIA Opposition to Summary Judgment*, January 30, 2017, ECF 271 at 5. But no clarifications followed.

The CIA violated Executive Order 13526 Section 1.7:

In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;
- (3) restrain competition; or
- (4) prevent or delay the release of information that does not require protection in the interest of the national security.

The Senate Select Committee's 1993 Report states that the CIA had not adhered to E.O. 13526:

When the Committee started its work, there was little evidence that... any government agency or department was systematically reviewing classified POW/MIA related information... This apparent government-wide failure to even consider declassifying POW/MIA information was inconsistent with the requirements of Executive Order 13526, in effect since 1982.

This failure to declassify was the catalyst for the next Executive Order, 12812.

(ii) 1992—Executive Order 12812

In July of 1992, after the Senate Select Committee on POW/MIA Affairs issued its Report, the Committee sent a letter to President Bush, relating that its "investigation has convinced us that the vast majority of materials related to the POW/MIA issue now protected by the National Security Classification System could be released to the public in full with absolutely no harm or risk to national security."

That declassification request was memorialized in Senate Resolution 324, which passed by unanimous a vote, and was the catalyst for Executive Order 12812—

Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action. E.O. 12812. Issued on July 22, 1992, it recites that the Senate had by Resolution

asked for 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," with the exception of where (1) "release of classified material could jeopardize continuing United States Government efforts to achieve the fullest possible accounting of Vietnam-era POWs and MIAs," or (2) release could constitute a clearly unwarranted invasion of personal privacy of returnees, family members of POWs and MIAs or (3) release "would impair the deliberative processes of the executive branch."

The CIA did not comply, again.

(iii) 1993—Presidential Directive

So, a year later, President Clinton issued a Presidential Directives directing the CIA to complete its review, and release, by Veterans Day, November 11, 1993, "all relevant documents" in accordance with Executive Order 12812."

Presidential Directives, better known as Presidential Decision Directives, or PDDs, are a form of an executive order issued by the President of the United States with the advice and analysis of the National Security Council. The directives articulate the executive's national security policy and carry the "full force and effect of law."

On June 10, 1993 President Clinton directed the CIA, among other departments and agencies:

In accordance with my Memorial Day Announcement of May 31, 1993, all executive agencies and departments are directed to complete by Veterans Day, November 11, 1993, their review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812.

Here too the CIA did not comply with the Executive Orders, as the record in this case amply demonstrates.

(iv) 2015 Decennial Review released previously over-classified records

In its May 11, 1995, CIA letter to Senate Select Committee on Intelligence, attached as Exhibit 1, the CIA reports that it had followed a "four-step review process in full compliance with the Act," and that, after notice published in the Federal Register, it received 15 letters that "unanimously supported the belief that current exemption standards exempt record groups which, due to time and changing events, no longer endanger national security." It thereafter hosted nine groups at the "CIA Headquarters on August 29, 1994, to share their views... [whose] comments paralleled those in the written submissions and focused on the need to recognize that the passage of time reduces the sensitivity of documents..."

One step in the process was for the CIA History Staff to "conduct a spot check of older DO designated operational files. As a result of this extensive review process, the Acting Director of Central Intelligence... removed from designated status [of] four file categories to FOIA search and review," and added three categories of DO files.

"The Acting Director also considered, but rejected, a recommendation by the History Staff that, except for files that reveal the identity of a confidential human intelligence source, no DO or DS&T files more than 40 years old be designated as exempt from FOIA search and review." The CIA also declined the CIA History Staff's proposal for automatic declassification of most records 25 years old, because "the Administration was planning a major overhaul of the classification system," so that "recommendation was both

unnecessary and impractical." Moreover, according to the CIA, its "serious consideration given to the History Staff's recommendation demonstrates the significant extent to which CIA's review of these designated files took account of their historical value and of the potential for declassifying information from them."

But the CIA did not properly consider in 2005 the "historical value or other public interest in the subject matter of the particular category of files." As plaintiffs observed in their *Motion for Stay*, ECF 278 at 2, the CIA's over-classification is evidenced by the 33 records that were released only upon its completion of its 2015 decennial review. The records are dated 1974 to 1990, from 28 to 45 years after Operation Homecoming. Plaintiffs' Interrogatories sought the CIA's justification for failing to declassify these 33 records during its decennial reviews in 1985, 1995, and 2005.

Interrogatory No. 4. Regarding the CIA's disclosures of the attached Exhibits 115-48, at Bates 359-419 (Exhibit A), released upon completion of the CIA's 2015 decennial review, explain each factor, and the weight assigned to it, upon which the decision to continue the operational designation was made, for the decennial reviews, in 1985, 1995, and 2005.

Interrogatory No. 5. Please explain how the passage of time effected the status of the documents at issue after 25 years, 50 years and after more than 60 years.

ECF 297-1 at 2.

Half of these 33 records regard POWs held in Laos. They include records on, variously, aerial photography, six POWs held in 1983, at least four instances of 1986 intelligence, 1988 intelligence on 20 American prisoners, and at least four 1989 reports of sightings of from two, to 14, POWs. The CIA's failure to disclose these records in 1995 or 2005 clearly demonstrates that it did not "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." 50 U.S.C. § 3141(g)(2).

The CIA has yet to respond to the Interrogatories, except to characterize them as a "distraction." *CIA Opposition to Motion for Stay*, ECF 300 at 4.

(v) Over-classification of 2016 release

In 2016, the year *after* its 2015 Decennial review, the CIA released one record, a 60-page report written in 1998, plus its 140 pages of attachments. It is the most illuminating record ever released on the issue of the number of POWs remaining in communist hands at war's end.

In November of 1998, six years after the conclusion of the Senate Select Committee's probe, Senator and former Committee Vice-Chairman Bob Smith issued, *Critical Assessment of 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. (aim.org/pdf/Hall-CIA/CIA-Production-2016-209-pages.pdf). The report unequivocally establishes the reliability of the so-called "1205 Document," which exposed that, just months before War's end, the Vietnamese reported that the number of communist-held American POWs in Southeast Asia was 1,205. Three months later, the Vietnamese government released 527, holding some 678 Americans.

Thus, in 2016, thirteen years after plaintiffs submitted their FOIA request, the CIA disclosed the 1998 record that authoritatively establishes the number of POWs remaining in Vietnam and Laos after Operation Homecoming in February of 1974.

III. Destruction of Files

The Court also ordered defendant to identify with some particularity the authority upon which it is said to have relied in destroying 114 files. "The Court therefore directs the CIA to provide further specificity as to the regulations and schedules applied to its decision to destroy the files." *Mem. Op.*, ECF 291 at 17. Further, the Court instructed that "[i]f the agency cannot confirm or deny the existence of that information in a public filing, so be it, but its inadequate responses thus far makes it impossible for the Court to grant the CIA's motion for summary judgment as to its searches." *Id.*

At the August 21, 2017 status hearing, the government responded that it had located the schedules. ECF 292 at 4:

MR. TAAFFE: The third item is the Court asked for additional specificity regarding the Agency's policies that it applied with respect to destruction of records concerning item 5, and there are 114 folders at issue. The Agency tells me that they have found those schedules, and they are conferring, and they will be able to provide them to the Court within a matter of weeks. One thing that's not entirely clear to me at this moment is to what extent those answers can be provided on a public document as opposed to *in camera*. But one way or the other, we'll provide them to you.

At the September 26, 2017 Status Hearing (ECF 293 at 4), the CIA said that it would file a motion for the Court's *in camera* review of the schedules that authorized the destruction of these files.

MR. TAAFFE: In terms of the destruction of files, there were questions about the destruction schedules, and we have the destruction schedules and the regulations setting those forth. The trick is that although those schedules, as they exist today, are not classified, the ones that were in existence at the time in the '80s are and were and remain classified. So we'll need to file a motion to file those for the Court's *in camera* review. There were 114 documents destroyed pursuant to that schedule. Of course, we can't know what those documents say because they were destroyed, but parenthetically we'd note we're not even sure they would've been responsive. But, regardless, the document destruction schedule and the explanation that we'll provide will explain what happened there.

At that hearing, Mr. Lesar remarked, "I'm sure it was inadvertent, but counsel indicated that the CIA was going to provide records on the scheduling of destruction orders. I think the Court's opinion also required regulations relating to destruction of orders, and I would like to see that that's included." *Id.* Plaintiffs also responded that "the Government was supposed to provide information which it now declares as classified and it seeks to file an explanation *ex parte*," and that such a submission would "require a motion for leave to file it *ex parte*, which we will probably oppose." *Id.* at 55.

The CIA did not move for *in camera* review, or otherwise produce the regulations or schedules, so *Plaintiffs' Request for Admissions to Defendant* emphasized this circumstance. ECF 297-2, January 31, 2018:

- Request 4: The Court "direct[ed] the CIA to provide further specificity as to the regulations and schedules applied to its decision to destroy the files." (Mem Op., ECF 291 at 14).
- Request 5: The CIA did not provide any further specificity regarding the regulations and schedules applied to its decision to destroy the records.
- Request 6: The government advised the Court at the September 26, 2017 Status Hearing (ECF 293 p. 4) that it would file a motion for the Court's *in camera* review of the destruction schedules that authorized the destruction of 114 documents.
- Request 7: The CIA did not file a motion seeking the Court's *in camera* review of the destruction schedules.

The CIA must describe, with particularity, how "it was later determined that 114 of those folders had been properly destroyed in accordance with the CIA's records control schedule," including whether they were destroyed after plaintiffs made their FOIA requests in 2003, in violation of General Records Schedule 14 and CIA Records Schedule NC1-263-85-1, Item 5(d), regarding "Records relating to actual or impending litigation."

Contrary to the CIA's claim that "there are no grounds to suspect it was done in bad faith" (*CIA Renewed Summary Judgment motion*, ECF 295 at 2), the government policy of nondisclosure warrants scrutiny into the still-unidentified regulations. Additionally, the record in this case includes an account of the CIA's illegal destruction of relevant records. *See, e.g., Hrdlicka Aff.*, ECF 261-1, ¶ 26: "Exhibit 50 is the 1992 DIA Memoranda re Destruction of POW Records by the CIA, written by Investigator John McCreary, at Bates 151-56."

CONCLUSION

Resolution of the dispositive motions in this matter must include, *inter alia*, a review of the basis for continued operational classifications in aged records. Here, there is a genuine issue of material fact as to whether the CIA is justified in continuing to classify these records as operational, or whether defendant "still keeps numerous documents classified under the guise of national security." *Smith Aff.*, ECF 258-4 ¶ 19.

WHEREFORE, Plaintiff Accuracy in Media, Inc., respectfully prays that this Court deny Defendant's Motion for Summary Judgment, and grant Plaintiffs' Motions for Summary Judgment.

DATE: December 14, 2018.

Respectfully submitted,

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