

**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.)	

DEFENDANT’S SUPPLEMENT TO ITS MOTION FOR SUMMARY JUDGMENT

In this action brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, Plaintiffs sought seven categories of records, or “Items,” relating to Vietnam Prisoners of War (“POWs”) and persons declared Missing in Action (“MIAs”). Currently pending before the Court are the Parties’ cross-motions seeking summary judgment. Specifically, Defendant, the Central Intelligence Agency (“CIA”), filed its fifth motion for summary judgment on November 29, 2017, *see* ECF No. 295, and Plaintiffs Accuracy in Media, Inc. and Roger Hall filed cross motions for summary judgment on December 14, 2018 and January 8, 2019, respectively, *see* ECF Nos. 312 & 319.

After the Parties’ respective motions were fully briefed, the Court issued a Memorandum and Order on May 23, 2019 requesting the CIA to “explain why it has not conceded or waived plaintiffs’ cross-motion for summary judgement, and—if possible—to supplement its original motion” in accordance with the Court’s Order. Mem. Op. (ECF No. 333) at 7. The Court explained that “[u]nless the government shows good cause, the Court will grant the plaintiffs’ motions and deny the government’s motion.” *Id.*

As the Court’s May 23, 2019 Order noted, the Court granted summary judgment in Defendant’s favor regarding five of the seven “Items” of Plaintiff’s FOIA request in 2017. *See*

Mem. Op. (ECF No. 291) at 13-14. The Court's May 23, 2019 Order also noted that the Court had previously laid out four steps for the government to resolve this case in its favor:

1. Provide more specificity on document destruction protocols;
2. Confirm or deny the existence of additional nonoperational records allegedly shown to Congress;
3. Disclose previously redacted names of non-CIA employees; and
4. Provide "no later than" dates for undated, fully withheld records.

See Mem. Op. (ECF No. 333) at 1-3. To address these outstanding issues, the Court authorized Defendant to supplement its motion for summary judgment in accordance with the May 23, 2019 Order. *Id.* at 7. Accordingly, Defendant provides the following additional information to supplement its pending motion for summary judgment, as supported by the supplemental declaration of Antoinette B. Shiner, the CIA's Information Review Officer (attached hereto).

I. Provide More Specificity on Document Destruction Protocols

In the Court's 2017 Memorandum Opinion, the Court denied in part the CIA's fourth motion for summary judgment and noted that, among other things, an issue remained regarding the CIA's acknowledgement that 569 nonoperational physical file folders contained records potentially responsive to Plaintiffs' FOIA request. *See* Mem. Op. (ECF No. 291) at 13-14. Specifically, the CIA had explained that 114 of these folders "had been properly destroyed in accordance with the CIA's records control schedule." *See* Declaration of Antoinette B. Shiner ("Shiner Decl.") ¶ 22 (ECF No. 248-2). In order to substantiate the CIA's claim that these folders had been "properly" destroyed, 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 No 291) at 14.

During two status hearings subsequent to the Court's 2017 Opinion, the CIA indicated

that it would be able to provide the CIA's record control schedules to the Court and that the schedules contained classified information. *See* 8/21/17 Tr. 4: 12-22 (ECF No. 292); 9/26/17 Tr. at 4: 11-24 (ECF No. 293). Then, the CIA filed its fifth motion for summary judgment in this proceeding defending, among other things, the CIA's destruction of the 114 folders. *See* ECF No. 295-1 at 5-6. In support, the CIA submitted a declaration that explained that the 114 folders were destroyed pursuant to the Record Control Schedules' requirements for "temporary" files. 11/29/17 Shiner Decl. ¶ 7 (ECF No 295-2).

In the Court's May 23, 2019 Order, the Court pointed out the CIA's failure to provide adequate information regarding the CIA's record control schedules, which the CIA had previously indicated it could provide for the Court's review. *Id.* at 5 (noting that the CIA's declaration contained "[n]othing that meaningfully helps the Court substantiate the government's inability to recover the 114 folders"). Accordingly, Defendant filed a motion seeking permission to file the CIA's relevant record control schedules for the Court's *ex parte, in camera* review, *see* ECF No. 334, which is currently pending before the Court.

According to the declaration of Antoinette B. Shiner, when the CIA discovered in 2013 that the 114 files had been destroyed, the CIA found information that indicated the relevant record control schedules that applied to each of the destroyed files. *See* Shiner Decl. ¶ 3. The CIA is now unable to reproduce with certainty the information that connected the specific record control schedules to any of the destroyed files; however, based on the CIA's review of its search efforts the CIA has identified record control schedules that are likely applicable to some of the 114 files. *Id.* The CIA is prepared to provide these specific record control schedules, which are classified, to the Court for its *ex parte, in camera* review, which would provide evidence that the files destroyed pursuant to these schedules were properly destroyed prior to the CIA's search.

Unfortunately the record control schedules, by themselves, cannot provide any additional information about the contents of the destroyed files or the CIA's decision to place any of those files in a particular record control schedule category. *Id.* ¶ 4. To the best of CIA's knowledge, the relevant record control schedules identified by the CIA provide some evidence that the destroyed files were largely administrative files, public relations files, working papers, and FOIA/Privacy Act requests. *Id.* ¶ 6. This is because CIA information management personnel must place a file in a record control schedule category upon their arrival at the archives, which provides for a certain period for retention. *Id.* ¶ 4. And, prior to the destruction of any file, the file is reviewed to determine whether further retention is required based on the record control category. *Id.*

Moreover, based on the relevant record control categories identified by the CIA as likely applicable to the destroyed files, it is unlikely that any of the destroyed files would have been responsive to Plaintiffs' request. *Id.* ¶ 6. This is because none of the categories of records identified in the relevant record control schedules are of the type that would have contained information or intelligence collection on prisoners of war or those missing in action. *Id.*

In sum, the CIA has reviewed records control schedule notations that were likely to pertain to the 114 destroyed files. Based on these efforts, the CIA has determined that the destroyed files were likely unresponsive to Plaintiff's FOIA request and consisted of mostly administrative files, public relations files, working papers, and FOIA/Privacy Act requests. The CIA has been unable to glean any additional information regarding these files. Further, these records were destroyed pursuant to the relevant record control schedules applicable to these types of records, which Defendant has offered to provide for the Court's *in camera*, *ex*

parte review.

II. Confirm or deny the existence of additional nonoperational records allegedly shown to Congress

As the Court stated in its 2017 Memorandum Opinion, the question before the Court is “whether the searches conducted by the CIA (of its non-exempted files) pursuant to the plaintiffs’ FOIA request were adequately likely to yield information related to that request.” Mem. Op. (ECF No. 291) at 13.

The CIA has been clear that it has searched all files likely to contain responsive records, with one exception—the CIA “did not search operational files which are exempt from search and review pursuant to the CIA Information Act of 1984, 50 U.S.C. § 3141.” *See* 7/13/16 Shiner Decl. ¶ 22 (ECF No. 248-2). As Defendant has previously submitted, the CIA Information Act permits the Director of the CIA to “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.” 50 U.S.C. § 3141(a); *see* Def.’s Reply in Support of its Mot. for Summ. J. (ECF No. 272) at 3-4. The CIA has previously noted that operational files are searched and reviewed in accordance with the CIA’s decennial review and were also reviewed pursuant to Executive Order 12812. *See* 1/30/17 Shiner Decl. ¶¶ 17, 21 (ECF No. 272-1).

The Court’s May 23, 2019 Order noted that Plaintiffs have presented evidence suggesting that the CIA shared additional potentially responsive records with members of Congress beyond those located by the CIA’s search. *See* Mem. Op. (ECF No. 333) at 2. Accordingly, the Court requested Defendant to “confirm or deny the existence of any more records.” *Id.*

During the CIA’s search efforts, all non-operational files deemed likely to contain responsive documents were searched. Shiner Decl. ¶ 8. These searches identified numerous

potentially responsive folders, which the CIA reviewed, produced, or withheld in accordance with the FOIA. *Id.* Moreover, even though the Senate Select Committee's records were exempt from FOIA search and release, the CIA agreed to search the Committee's records (which had been sent to the National Archives and Records Administration ("NARA") for declassification), and released over 1,000 records. *See* 11/29/17 Shiner Decl. ¶¶ 14-15 (ECF No. 295-2). As a result of these search efforts, which were appropriately cabined to the CIA's non-operational files, the CIA did not locate any of the alleged additional records raised by the Plaintiff. Therefore, the CIA denies having located or being made aware of the existence of additional non-operational records allegedly shown to Congress. Shiner Decl. ¶ 8.

The CIA cannot foreclose the possibility that additional records, including those alleged to exist by Plaintiff, are located in the CIA's operational files and that such records could have been shown to Congress. *Id.* ¶ 9. According to the declaration of Antoinette Shiner, in order to confirm or deny the existence of such records the CIA would have to conduct a search of the operational files. *Id.* As noted above, the CIA has not searched any operational files in response to Plaintiff's FOIA request and the CIA maintains that it is not required to do so. Instead, as Defendant's motion explained, all operational files are subject to a decennial review that takes into consideration the specific contents of each file series including the age of the documents, the historical value, and the public interest. ECF No. 295-1 at 6-8; Shiner Decl. ¶ 10. If the file series no longer contains viable sources and methods information, it is pulled from the operational files category and placed in non-operational file systems, which were searched by the CIA in response to Plaintiffs' FOIA request. *Id.*

In light of the above, the CIA respectfully submits that it conducted a reasonable search of non-operational files in response to Plaintiffs' FOIA request. In order to confirm or deny the

existence of any additional records located in the CIA's operational files, the CIA would have to conduct a search of those files. The CIA maintains that the FOIA does not require such a search.

III. Disclosure of previously redacted names of non-CIA employees

In Defendant's pending renewed motion for summary judgment, Defendant noted that the CIA was considering whether to appeal the production of names of non-CIA personnel and disclaimed any intention of litigating that issue further before this Court. *See* ECF No 295-1 at 2. However, the CIA now intends to release the names of non-CIA personnel who are named in the responsive records as soon as possible. Shiner Decl. ¶ 11. Unfortunately, as this case was delayed through numerous extension requests, so too was the task of going back through the CIA's productions and producing the names to Plaintiffs. The CIA regrets this delay and is now reviewing and processing its prior productions consistent with the Court's prior orders. These names will be released to Plaintiff and Defendant will update the Court when this process is complete.

IV. Provide "no later than" dates for undated, fully withheld records

As the Court's May 23, 2019 Order acknowledged, the CIA has provided the "No Later Than" dates for the three undated denied-in-full documents. *See* 11/29/17 Shiner Decl. ¶ 3 (ECF No. 295-2). Accordingly, Defendant considers this issue to be resolved.

CONCLUSION

For the foregoing reasons, the CIA respectfully requests that the Court to grant the CIA's renewed motion for summary judgement.

Respectfully submitted,

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