UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Civil Action No. 98-1319 (PLF)

ORDER

Upon consideration of defendant's motion for summary judgment, plaintiff's opposition, defendant's reply and the numerous supplemental memoranda that have been filed, as well as the affidavits and declarations filed by both parties, and for the reasons stated in the Opinion accompanying this Order, it is hereby

ORDERED that defendant's motion for summary judgment is GRANTED in part and DENIED in part without prejudice to its renewal; and it is

FURTHER ORDERED that on or before October 16, 2000, defendant shall provide the Court with supplemental affidavits or declarations demonstrating the adequacy of its search for records responsive to plaintiff's FOIA request and justifying the nondisclosure of

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any additional records that were discovered. Plaintiff may respond to any supplemental affidavits or declarations on or before October 30, 2000.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 8/9/00

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Plaintiff,

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CENTRAL INTELLIGENCE AGENCY,

Defendant.

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OPINION

The Court has before it for decision a motion for summary judgment filed by defendant, the Central Intelligence Agency. Upon consideration of the motion, plaintiff's opposition, defendant's reply, numerous supplemental memoranda, and the affidavits and declarations filed by the parties, the Court finds that the CIA has not established the adequacy of its search for documents, but that it has properly invoked various exemptions to the FOIA to justify the withholding and redaction of certain documents responsive to plaintiff's FOIA request.

I. BACKGROUND

Since the conclusion of the Vietnam War, there has been much speculation about the fate of the American soldiers that were left behind in Vietnam. The public's interest in the subject resulted in the Senate's appointment of a Select Committee to investigate the missing prisoners of war and those missing in action – POW/MIAs -- in 1991. At the conclusion of its inquiry, the Senate directed the President to issue an executive order commanding all federal

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agencies to "declassify and publicly release without compromising U.S. national security all documents, files and other materials pertaining to POWs and MIAs." S. Res. 324, 103d Cong. (1992). Soon thereafter President Bush issued Executive Order 12,812 directing the release of all non-sensitive materials "pertaining to American POWs and MIAs lost in Southeast Asia." Exec. Order No. 12,812. President Clinton reaffirmed this Executive Order in Presidential Decision Directive NSC 8, requiring all executive branch agencies to complete their review of documents and files under Executive Order 12,812 by Veterans' Day 1993. See Presidential Decision Directive NSC 8, Defendant's Motion for Summary Judgment, Exh. 6.

Plaintiff Roger Hall is a researcher on the subject of the POW/MIAs of Vietnam. Among other things, he works with 19 families of POW/MIAs to attempt to track down information on their missing sons. Since the dissolution of the Senate Select Committee, he has submitted five requests for documents under the FOIA. The first request, which is the basis for Count I of his complaint, was submitted on January 5, 1994 and requested "all CIA information on S.E. Asia POW/MIAs (civilian and military) that have not returned even if they are not now held in prisoner status." Compl. Attachment A. His letter further asked for all information on such POW/MIAs sent to China, North Korea or Cuba. Id. Having just searched its files for documents related to POW/MIAs pursuant to Executive Order 12,812, the CIA gave plaintiff a computer-generated list of previously released documents and asked him to identify any documents in which he was interested. Compl. Attachment B; see also Declaration of William H. McNair ("McNair Decl.") ¶ 4. The CIA also informed plaintiff that it was working to release more documents in keeping with President Bush's Executive

Order. Compl. Attachment B. Finally, the CIA completed a manual, document-by-document search of all documents concerning POW/MIAs that were not released to the Library of Congress under Executive Order 12,812. See McNair Decl. ¶ 35.

Plaintiff then sent a second letter to the CIA by which he intended to "clarif[y] and narrow[]" his original FOIA request. Compl. Attachment C at 2. In his clarifying letter, he requested information on:

> POW/MIAs sent out of S.E. Asia (to China, Russia, N. Korea, Cuba, etc.); whether they be civilian or military even if they are not now in a prisoner status as long as that they at any time were a POW/MIA and have not returned, been returned, or their remains returned . . . .

Compl. Attachment C at 1. The CIA provided plaintiff with documents responsive to his request from the computer printout of released documents in two installments, on May 25, 1994 and on January 17, 1995. Plaintiff also was allowed to visit the CIA's reading room. Plaintiff appealed the agency's decision on February 9, 1995, arguing that the agency should have conducted an individualized search for the documents he requested. The CIA denied the appeal on May 13, 1995.

Nearly three years later, on April 23, 1998, plaintiff submitted four more FOIA requests through his counsel. These requests are the bases for Counts II through V of his complaint. The requests were as follows:

> 1. All radio and television broadcast intercepts and newspaper articles from 1968 through and including 1973 that are within the possession and control of your agency or any agency components . . . . You may omit from this request those documents which were included in the published Foreign Broadcast Information Service (FBIS) Far East volume for those years. Compl. Attachment G.

2. Any or all records, reports, memoranda or other documents, in the possession and control of your agency which were prepared by and assembled by the [CIA] . . . between January 1, 1971 and December 31, 1975 relating to the status of any United States prisoners of war (POWs) or those missing in action (MIAs) in Laos, including but not limited to any reports prepared by Mr. Horgan or any other agent or employee of the CIA for the Joint Chiefs of Staff, the President or any other agency . . . . Compl. Attachment H.

3. [T]hose records of the [Senate] Select Committee on POW/MIA Affairs that were withdrawn from the collection of the National Archives and returned to [the CIA] for processing. Compl. Attachment I.

4. [A]ny and all records in the possession and control of your agency" relating to 19 individuals who allegedly are POW/MIAs from the Vietnam era. Compl. Attachment J.

After once again reviewing the documents that had not been released to the Library of Congress, see Supplemental Declaration of William H. McNair ("McNair Decl. II") ¶ 7, the CIA responded to these requests in May and June of 1998. For the first request, the CIA found that plaintiff was not entitled to any documents because all documents that would be responsive had been published in the FBIS Far East volume, a category of documents explicitly excluded by plaintiff from his FOIA request. The CIA found five documents that were responsive to the second request; two were released in full and three were withheld in full. See McNair Decl. ¶ 35. The CIA produced no documents in response to the third request on the ground that any documents from the Senate Select Committee are congressional records that are not subject to the FOIA. Finally, the CIA initially released 34 documents in response to the fourth request. See McNair Decl. ¶ 35. While some of these documents contained prior

redactions, the CIA claims that it could not locate the original unredacted versions for 22 of the documents. See Defendant's Further Reply at 12.

Some time after providing its original response, the CIA conducted an additional search and found four more documents responsive to the fourth request. Two of these documents were released in full, one was released in part and one was withheld. Finally, after the briefing in this lawsuit was under way, the CIA discovered a "missing cabinet" of documents. See McNair Decl. II ¶¶ 19-21. After conducting a document-by-document review of everything in the "missing cabinet," the CIA found 49 documents that are responsive to Counts I, II, III and V of plaintiff's complaint. See id. Seven of these documents were withheld in their entirety, 18 were released in part, five were released in full and 19 were referred to the Department of Defense and the Department of State for evaluation. See id. The State Department released six of the seven documents it reviewed in full and the remaining document in part. See Declaration of Margaret Grafeld ("Grafeld Decl.") ¶ 3. The Defense Department released seven of the 14 documents it reviewed in full and the other seven in part. See Declaration of John R. Horn ("Horn Decl.") ¶ 3.[1]

Plaintiff challenges the CIA's response to his requests on a number of grounds. In particular, he claims that summary judgment is inappropriate because: (1) the CIA did not perform an adequate search for documents responsive to his requests; (2) the documents from the Senate Select Committee are not exempt from disclosure under the FOIA; and (3) the

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[1] Because the Department of Defense and Department of State claim to have reviewed 21 documents in total whereas the CIA claims to have referred only 19 documents for review, the Court assumes that two documents were sent to both agencies for review. The CIA should clarify this numerical inconsistency in any supplemental declarations it files.

declarations submitted do not support the withholding of documents and the redactions made under the FOIA.

II. DISCUSSION

A. Adequacy of the Search

Before it can obtain summary judgment in a FOIA case, an agency "must show, viewing the facts in the light most favorable to the requester, that . . . [it] 'has conducted a search reasonably calculated to uncover all relevant documents.'" Steinberg v. United States Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1985)). In determining the adequacy of a FOIA search, the Court is guided by principles of reasonableness. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); International Trade Overseas, Inc. v. Agency for International Development, 688 F. Supp. 33, 36 (D.D.C. 1988) (citing Weisberg v. United States Dep't of Justice, 745 F.2d at 1485). While there is no requirement that an agency search every record system, Truitt v. United States Dep't of State, 897 F.2d 540, 542 (D.D.C. 1990), or that a search be perfect, Meeropol v. Meese, 790 F.2d 942, 955-56 (D.C. Cir. 1996), the search must be conducted in good faith using methods that are likely to produce the information requested if it exists. Campbell v. United States Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998).

To establish the adequacy of a search, agency affidavits or declarations must be "relatively detailed and non-conclusory . . . ." SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1200 (D.C.Cir. 1991) (quoting Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771

(D.C.Cir. 1981)). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" SafeCard Services, Inc. v. SEC, 926 F.2d at 1200. While the affidavits submitted by the agency need not "set forth with meticulous documentation the details of an epic search for the requested records," Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982), they must show "that the search was reasonably calculated to uncover all relevant documents," Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983), and that there was "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Campbell v. United States Dep't of Justice, 164 F.3d at 27. The evidence offered by the agency must "describe what records were searched, by whom, and through what processes." Steinberg v. United States Dep't of Justice, 23 F.3d at 552. Without such information, a plaintiff is not able to challenge the adequacy of defendant's search, and the Court is not able fairly to evaluate it. Weisberg v. United States Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980). Under such circumstances, the adequacy of the search remains in doubt, and summary judgment is not proper. See Campbell v. United States Dep't of Justice, 164 F.3d at 27 (summary judgment not proper where record before court "leaves substantial doubt as to the sufficiency of the search"). Accord Valencia-Lucena v. United States Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999).

Plaintiff challenges the adequacy of the search conducted by the CIA on a number of grounds. Specifically, he contends that the declarations filed by the CIA in its motion for summary judgment (1) provide inadequate information regarding the procedures for

the search and demonstrate that the CIA failed to use a number of obvious search terms that would likely have located responsive documents, and (2) indicate that the CIA did not search for aerial reconnaissance photographs or documents created, obtained or maintained after 1993. Plaintiff also requests discovery to inquire further into the search methods used by the CIA.

1. The CIA's Search Methods

Plaintiff initially contends that the government's description of its search is vague and conclusory and therefore leaves "substantial doubt as to the sufficiency of the search." Campbell v. United States Dep't of Justice, 164 F.3d at 27. While the CIA has provided a wealth of information regarding the search conducted in response to plaintiff's request, the Court concludes that the CIA has not satisfied its burden of establishing that the search was adequate. The three declarations submitted by William H. McNair of the CIA describe the well-conceived and extensive search conducted by the CIA -- including the electronic searches conducted of each directorate of the CIA pursuant to Executive Order 12,812, the manual search of those files reasonably expected to contain relevant documents, the review of every document withheld under Executive Order 12,812 by personnel familiar with plaintiff's request, and the review of an additional filing cabinet of materials located after plaintiff filed his opposition. See McNair Decl. ¶¶ 25-35; McNair Decl. II ¶¶ 11-14, 19-20. The McNair declarations, however, lack a few essential details that the Court needs in order to evaluate whether the search was sufficient.

Specifically, Mr. McNair provides the terms used to search only one of the CIA's four directorates -- the Directorate of Operations. See McNair Decl. ¶ 26. Without an understanding of the terms used to search the other directorates, the Court cannot evaluate whether those terms were "reasonably calculated" to recover the responsive records. See Valencia-Lucena v. United States Coast Guard, 180 F.3d at 325. The Court also is unable to determine whether the CIA's search of the Directorate of Operations was "reasonably calculated" to locate responsive records because the CIA did not appear to search for the term "PW" despite the fact that the majority of internal documents disclosed to the Court refer to the POW/MIAs by the term "PW" or "PWs." See, e.g., Affidavit of Plaintiff Roger Hall ("Hall Aff."), Attachments S, U, X, Y, A-6.[2] The CIA therefore may supplement its declarations to clarify the search methods used and to address the concerns expressed herein: additional searches may or may not be required.

2. The Scope of the CIA's Search

In addition to the methods used to search for documents, plaintiff contends that the search described by Mr. McNair was incomplete because the CIA did not search for several types of materials that were responsive to plaintiff's request. Plaintiff first argues that the CIA did not search for any materials created or obtained after the CIA's production of documents to the Library of Congress under Executive Order 12,812 on November 11, 1993.

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[2] Defendant maintains that the variations of search terms proposed by plaintiff are unnecessary because its databases were equipped to search for subjects on the basis of their "root word." See Third Declaration of William H. McNair ¶ 6. The term "POW," however, does not share a root word with the terms "PW" and "PWs." It therefore appears that none of the CIA's searches were designed to locate documents using the terms "PW" and "PWs."

Because plaintiffs' first and second requests on April 23, 1998 (Counts II and III of the Complaint) only concerned records produced prior to 1993, this argument is applicable only to plaintiff's January 7, 1994 request (Count I) and to his third and fourth requests of April 23, 1998 (Counts IV and V). Because the CIA had no obligation to conduct any searches in response to plaintiff's third request of April 23, 1998 (Count IV) since it was a request for non-agency documents outside the scope of the FOIA, see infra at 14-16, the discussion that follows relates only to the CIA's post-1993 searches pursuant to plaintiff's other two requests (Counts I and V).

Under CIA policy, a search is to be conducted up to the date on which the agency sent out a letter acknowledging receipt of the FOIA request. See Third Declaration of William H. McNair ("McNair Decl. III") ¶ 14; cf. Judicial Watch, Inc. v. Clinton, 880 F.Supp. 1, 10 (D.D.C. 1995) ("The date of the request, not the date of the response, serves as the cutoff for any obligations under FOIA"). The CIA sent a letter acknowledging plaintiff's initial request on January 13, 1994. The CIA sent another letter acknowledging plaintiff's other requests on May 29, 1998. The agency therefore was required to update its search pursuant to Executive Order 12,812 for the period between November 11, 1993 and January 13, 1994 for the first request and for the period between November 11, 1993 and May 29, 1998 for the fourth request of April 23, 1998.

The CIA has not provided sufficient evidence regarding its search for materials from either period of time. All the CIA has provided regarding its efforts to discover post-1993 documents responsive to plaintiff's initial request are the statements (1) that "the Agency in good faith continues to provide any additional releasable [sic] POW/MIA material to the

Library of Congress," and (2) that "[t]he Agency has not released any documents to the Library of Congress that were created between 13 November 1993 and 13 January 1994." McNair Decl. III ¶ 15. Similarly, the CIA's only statement regarding the post-1993 search for the fourth request of April 23, 1998 was that "[t]he search was conducted in manner [sic] that it would capture any documents created prior to the date the Agency acknowledged plaintiff's request." McNair Decl. III ¶ 20. Because the CIA has provided no information regarding the databases searched or the methods used to locate documents, the Court cannot judge in either case whether the CIA's searches conducted after November 11, 1993 were adequate. The CIA therefore will be required to conduct further searches and/or to supplement its declarations to describe its post-1993 searches with particularity.

Plaintiff also objects to the CIA's interpretation of his original FOIA request to include only information regarding POW/MIAs that were sent outside of Southeast Asia. Plaintiff's letters, however, appear to request exactly that. Plaintiff's letter of January 5, 1994 requested "all CIA information on S.E. Asia POW/MIAs (Civilian and Military) that have not returned even if they are not now held in prisoner status." See Compl. Attachment A. Plaintiff then sent a second letter intended to "clarif[y] and narrow[] the scope" of his request to include information regarding those "POW/MIAs sent out of S.E. Asia (to China, Russia, N. Korea, Cuba, etc.)." See Compl. Attachment A. Given the apparent intent of plaintiff's second letter to narrow the scope of his request, the CIA reasonably interpreted plaintiff's language to encompass only documents about POW/MIAs sent outside of Southeast Asia. See Kowalczyk v. Department of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996) (agency must

produce records that are "reasonably described in a written request therefor and not exempt from disclosure").

Finally, plaintiff argues that the CIA's responses to his requests were incomplete because they did not include aerial reconnaissance photographs or analysis. The CIA maintains that it was not required to turn over any photographs because photographs are a qualitatively different type of document from those requested by plaintiff. In support of its argument, the CIA relies on Judge Richey's opinion in Canning v. Department of Justice. 848 F.Supp. 1037 (D.D.C. 1994). The court in Canning held that an agency's failure to turn over photographs did not call into question the adequacy of its search when the request was for "documents" and did not specifically mention photographs. See id. at 1051. Plaintiff in this case, however, requested "information" and "records" -- terms that encompass more than written documents.

The Supreme Court has held that the term "agency records" for purposes of the FOIA includes "all books, papers, maps, *photographs*, machine readable materials, or other documentary materials, regardless of physical form or characteristics . . . ." Forsham v. Harris, 445 U.S. 169, 183 (1979) (emphasis added) (quoting by analogy the Records Disposal Act, 44 U.S.C. § 3301); see also Gilmore v. United States Dep't of Energy, 4 F.Supp.2d. 912, 917 (N.D. Cal. 1998). If anything, the term "information" is broader than the term "records" and also should include photographs. Thus, while the Court is uncertain whether the CIA located photographs during its search, the established case law makes clear that plaintiff's request should have been read to include photographs. The CIA should either release any responsive photographs to plaintiff or, if necessary, conduct an additional search designed to

locate any responsive photographs that may exist. If there are such photographs, they either must be disclosed or their nondisclosure justified through a supplemental declaration.

3. Discovery

Plaintiff requests discovery under Rule 56(f) of the Federal Rules of Civil Procedure, so that he can further contest the adequacy of the CIA's search by showing evidence "that will directly refute Defendant's denial of the agency's involvement in the Vietnam era activities." Plaintiff's Supp. Opp. at 10. The grant of discovery, however, is not favored in lawsuits under the FOIA. Instead, when an agency's affidavits or declarations are deficient regarding the adequacy of its search, as they are here, the courts generally will request that the agency supplement its supporting declarations. See Nation Magazine, Washington Bureau v. United States Customs Service, 71 F.3d 885, 892 (D.C. Cir. 1995) ("The [district] court should order Customs to provide additional information" on the adequacy of its search); Oglesby v. United States Dep't of the Army, 920 F.2d 57. 68 (D.C. Cir. 1990) ("On remand, the district court may order State to submit a reasonably detailed affidavit upon which the reasonableness of its search can be judged"). As no reason exists to distinguish this case from the general rule, the Court will not grant discovery.[3]

[3] Plaintiff tries to justify his discovery request by alleging that the CIA has engaged in bad faith in this litigation. The Court will not reach the issue of whether plaintiff could obtain discovery on this ground because plaintiff has not provided any evidence sufficient to establish bad faith on the part of the CIA.

B. The Senate Select Committee Documents

The CIA did not provide any documents in response to plaintiff's request for "records of the [Senate] Select Committee on POW/MIA Affairs that were withdrawn from the collection of the National Archives and returned to [the CIA] for processing" because it claims that the responsive records are congressional documents that are not subject to the FOIA. Compl. Attachment I. Plaintiff does not dispute that the FOIA explicitly exempts congressional documents from its ambit. See 5 U.S.C. § 551(1)(A). He does maintain, however, that because only the CIA can decide whether the documents will be declassified, Congress has given control over the documents to the CIA so that they are no longer considered congressional documents under the FOIA.[4]

When an agency obtains documents from Congress, the documents will become "agency records" subject to the FOIA only if "the agency to whom the FOIA request is directed [has] exclusive control of the disputed documents." Paisley v. CIA, 712 F.2d 686, 693 (D.C. Cir. 1983), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1994). See

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[4] Plaintiff also argues that the original CIA documents that were submitted to Congress are not exempt from the FOIA because they were created by the CIA. See Washington Post v. Department of Defense, 766 F.Supp. 1, 17-18 (D.D.C. 1991). The CIA admits that the documents that it created are subject to the FOIA and that it must search for copies of these documents that are contained in its files and disclose them, in whole or in part, if not exempt under the FOIA. The CIA nevertheless contends that the particular set of CIA documents that are attached to the Senate Select Committee documents are exempt because they have been incorporated into the record as a whole. In making this argument, the CIA suggests that it has searched for, located and evaluated under the FOIA the identical copies of all documents of its own creation when it searched its own files. See Defendant's Reply at 22. In preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents.

also Goland v. CIA, 607 F.2d 339, 346 (D.C. Cir. 1979), vacated in part on other grounds, 607 F.2d 367 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980) (document is an agency record if "under all of the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides"); Washington Post v. United States Dep't of Defense, 766 F.Supp. 1, 17 (D.D.C. 1991) (quoting Goland) (Congress does not abandon control if it transfers document to agency for limited purposes). "If . . . Congress has manifested its own intent to retain control, then the agency -- by definition -- cannot lawfully 'control' the documents . . . , and hence they are not 'agency records.'" Paisley v. CIA, 712 F.2d at 693.

Here, Congress has unequivocally "manifested its own intent to retain control" over the documents of the Senate Select Committee. In its original letter dated January 27, 1993, sending the records to the National Archives, the Senate stated that it was "transmitting . . . , for preservation and safekeeping, approximately 275 boxes of Select Committee classified records . . . ." Letter from Senator John F. Kerry and Senator Bob Smith to Dr. Don Wilson, Defendant's Motion for Summary Judgment, Exhibit 12. There is no indication in the letter that the Senate intended to relinquish its claim to the documents. In fact, the letter stated that "requests for access to the classified materials shall be directed to the Secretary of the Senate," clearly indicating the desire of the Senate to retain control over the disposition of the documents. Id. The Secretary of the Senate sent a second letter to the National Archives on July 28, 1993 to "clarify" the first letter. See Letter from Walter J. Stewart, Secretary of the Senate to Dr. Trudy H. Peterson, Defendant's Motion for Summary Judgment, Exhibit 12. The second letter set forth specific instructions for the handling of the "Committee's records."

including instructions that the Senate should be consulted regarding any records that might contain information implicating national security. Id. at 1. There is again no indication that the Senate intended to relinquish control over the documents.

Finally, once the National Archives forwarded the documents to the CIA for processing and plaintiff filed this lawsuit, the Secretary of the Senate wrote a third letter to the National Archives, on October 7, 1998, stating that "a transfer of congressional control over the Select Committee's records demonstrably has not occurred." Letter from Gary Sisco, Secretary of the Senate, to John W. Carlin, Defendant's Motion for Summary Judgment, Exhibit 12.[5] The third letter reviewed the correspondence between the Senate and the Archives and reaffirmed the fact that the Senate never intended to allow any agency to control the documents. See id. Given the apparent intent of the Senate to retain control over the Senate Select Committee documents at the time they were transferred to the National Archives, as well as the Senate's recent reaffirmation of its intent in its October 7, 1998 letter, the Court concludes that the documents are not "agency records" subject to the FOIA.[6]

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[5] Plaintiff argues that the Court should not consider this October 7, 1998 letter because it is "a self-serving, after-the-fact attempt to recreate history." Plaintiff's Opp. at 21 n.6. In support of his argument, plaintiff relies on two cases of our court of appeals holding that *post hoc* correspondence between Congress and an agency cannot provide sufficient evidence of Congress' intent to retain control of its documents. See Holy Spirit Ass'n v CIA, 636 F.2d 838, 842 (D.C. Cir. 1981), vacated in part, 455 U.S. 997 (1982); Paisley v. CIA, 712 F.2d at 695. Neither of these cases, however, stands for the proposition that the Court may not consider such evidence; rather, they hold only that after-the-fact correspondence cannot be the sole evidence of Congressional intent.

[6] Even in the face of the Senate's clear desire to maintain control over the documents, plaintiff argues that the Court should find that the CIA gained control over the documents because only the CIA could declassify the documents and allow them to be released. Executive Order 12,958, however, requires Congress to refer documents to

C. Specific Statutory Exemptions

The CIA, the Department of State and the Department of Defense withheld and redacted documents responsive to plaintiff's requests under Exemption 1 and Exemption 3 of the FOIA.[7] Plaintiff contests the government's position regarding each exemption. Plaintiff also maintains that the government has not provided any support for a number of redactions made in the documents provided in response to his fourth request of April 23, 1998 (Count V). The Court will address each of plaintiff's arguments in turn.

1. Exemption 1

Exemption 1 of the FOIA protects from disclosure information that falls "under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and . . . [is] in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). The CIA, the Department of State and the Department of Defense invoke Exemption 1 to withhold classified information in the responsive documents that concerns

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executive agencies for decisions regarding declassification. See Executive Order 12,958 § 1.4. Under the logic of plaintiff's argument, therefore, any congressional document undergoing declassification review would be subject to the FOIA irrespective of Congress' intent, because Congress is *required* to allow an executive agency to decide whether or not it may be released. To adopt plaintiff's position would make no logical sense and would render irrelevant the intent-focused analytical approach taken by the court of appeals.

[7] The Department of State also invoked Exemption 6 to protect the personal privacy of a foreign businessman mentioned in a single responsive document. See Declaration of Margaret P. Grafeld ¶ 10. The Court credits the Department of State's finding that there was "at least an implied expectation of confidentiality" given to the businessman and therefore concludes that Exemption 6 was properly invoked by the Department of State. See Declaration of Margaret P. Grafeld ¶ 10. The CIA also invoked Exemption 6 at one point in this matter, but later indicated that "the concerned institutions agreed to produce the requested names and that they have been released to the plaintiff." Defendant's Further Reply at 14.

intelligence sources, intelligence methods and the names and locations of covert foreign CIA installations. See McNair Decl. ¶¶ 38-45, 47-50; McNair Decl. II ¶¶ 24-25, 30; Grafeld Decl. ¶ 9; Horn Decl. ¶ 14.

Under Executive Order 12,958, an agency normally must declassify documents, such as many of the documents at issue, that are more than 25 years old. See Executive Order 12,958 at § 3.4(a). Documents that are over 25 years old, however, should not be declassified if the information in the documents would "reveal information about the application of an intelligence source or method" or would "reveal information that would seriously and demonstrably impair relations between the United States and a foreign government." Id. §§ 3.4(b)(1,6). The CIA and the Departments of State and Defense claim that they withheld the documents or portions of documents at issue because the documents contain information that would reveal the identity of intelligence sources and the classified methods that were used to collect the information and would threaten foreign relations by revealing unacknowledged CIA field installations in foreign countries. See McNair Decl. ¶¶ 38-45, 47-50; McNair Decl. II ¶¶ 24-25, 30; Grafeld Decl. ¶ 9; Horn Decl. ¶ 14. While plaintiff admits that information can be properly withheld for these reasons, he maintains that some of the sources and installations may have been disclosed to the foreign governments and therefore that information regarding these sources and installations should not be classified. He therefore requests that the Court examine the documents *in camera* to determine whether the sources and installations need to be classified.

Agency affidavits and declarations with respect to documents withheld under Exemption 1 are accorded "substantial weight" because "the Executive departments responsible

for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosures of a particular classified record." Krikorian v. Department of State, 984 F.2d 461, 464 (D.C.Cir. 1993) (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)). While the affidavits or declarations "must show, with reasonable specificity, why the documents fall within the exemption," Campbell v. United States Dep't of Justice, 164 F.3d at 30 (quoting Hayden v. National Security Agency, 608 F.2d 1381, 1387 (D.C.Cir. 1979)), that test is met here. In the circumstances, the declarations of the CIA and the Departments of State and Defense are as specific as possible regarding the type of information that was withheld, the applicability of Executive Order 12,958, and the invocation of Exemption 1. They adequately describe "the context and nature of the withheld information." Campbell v. United States Dep't of Justice, 164 F.3d at 31. In addition, there is no evidence of agency bad faith and no evidence in the record that contradicts the declarants' representations. See Halperin v. CIA, 629 F.2d 144, 148 (D.C.Cir. 1980). Finally, Mr. McNair states that none of the withheld information has been disclosed to foreign governments; despite plaintiff's speculation to the contrary, the Court has no reason to doubt Mr. McNair's representations. See McNair Decl. II ¶¶ 15-16. On the basis of the McNair, Grafeld and Horn Declarations, the Court concludes that the agencies properly invoked Exemption 1 and that the documents in question were properly withheld or redacted.

2. Exemption 3

Exemption 3 of the FOIA protects from disclosure information that is "specifically exempted from disclosure by statute . . . provided that such statute (A) requires

that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The CIA has invoked Exemption 3 to withhold information regarding the identities of foreign sources of information, methods of intelligence gathering, organizational and functional information and the location of covert field installations. See McNair Decl. ¶¶ 37-50; McNair Decl. II ¶¶ 24-30. Intelligence sources and methods may be protected under the National Security Act of 1947, as amended, 50 U.S.C. § 403-3(c)(6), while the Central Intelligence Agency Act of 1949 exempts the CIA from any provision of law "which require[s] publication or disclosure of the organization, functions, names, official titles, salaries or numbers of personnel employed by the Agency." 50 U.S.C. § 403g; see Blazy v. Tenet, 979 F.Supp. 10, 23 (D.D.C. 1997) (information may be withheld under the FOIA pursuant to Exemption 3 under the National Security Act of 1947 and the Central Intelligence Agency Act of 1949).

The Department of Defense also invoked Exemption 3 to withhold information regarding the last known locations of a particular POW/MIA, the organization of the Defense Intelligence Agency ("DIA") and the organization of the CIA. The last known locations of the POW/MIA were withheld under the McCain Bill, which forbids the disclosure of such information when the POW/MIA's next of kin has not given express permission for its release. See Horn Decl. ¶ 8A; see also Pub. L. No. 100-190, § 1082(b)(2). Information regarding the organization of the DIA was withheld under the DIA exemption from disclosure. See Horn Decl. ¶ 8B; see also 10 U.S.C. § 424. Finally, information regarding the organization of the

CIA was withheld under the Central Intelligence Agency Act of 1949. See Horn Decl. ¶ 8C; see also 50 U.S.C. § 403g.

Plaintiff makes no objection to the statutory bases for the agencies' actions. Instead, he once again contends that some of the information withheld by the agencies may have been disclosed to foreign governments and therefore may not have to be classified. The Court rejects this argument for the same reasons stated in the discussion of Exemption 1. See supra at 19.

3. Unsupported Redactions

Plaintiff also objects to redactions in 22 documents that he received in response to his fourth request of April 23, 1998. The CIA does not provide any reasons for these redactions; rather, it states that the redactions were made in connection with previous unrelated FOIA requests and that, despite diligent efforts, it cannot locate unredacted versions of these documents. See Defendant's Further Reply at 12. It is established that the FOIA does not require an agency "to recreate or reacquire a document that it no longer has." See SafeCard Services, Inc. v. SEC, 926 F.2d at 1201. Since the CIA may be required to conduct further searches of its files pursuant to this Opinion and the accompanying Order, however, it may discover the missing unredacted versions of some or all of the 22 documents and should specifically look for them in any supplemental search it conducts. The Court therefore will refrain from deciding at this time whether the CIA has fulfilled its obligations under the FOIA regarding the 22 redacted documents. The CIA should address this issue in any supplemental declarations it files.

III. CONCLUSION

The CIA has not provided the Court with sufficient evidence to enable it to evaluate the adequacy of the CIA's search for documents responsive to plaintiff's FOIA requests. The Court therefore will require the CIA to supplement its declarations to address the identified deficiencies. With regard to the documents withheld or redacted to this point by the CIA, the Department of State and the Department of Defense, the Court finds that the agencies properly invoked the relevant exemptions to the FOIA.

An Order consistent with this Opinion is entered this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 8/9/10