

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT MOORE, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	
)	Civil Action No. 20-1027 (RCL)
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

AMENDED COMPLAINT

Violations of Freedom of Information Act, 5 U.S.C. § 552;
Improper Withholding of Operational Files under 50 U.S.C. § 3141(f);
Improper Considerations of Historical Value and Public Interest in
Decennial Reviews of Exempted Operational Files under 50 U.S.C. § 3141(g)(2)

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, and 50 U.S. Code § 3141—*Operational files of the Central Intelligence Agency*. Plaintiffs Robert Moore, Jana Orear, Christianne O’Malley, Mark Sauter, and Michael Driggs seek disclosure of records improperly withheld by the Central Intelligence Agency.

Preliminary Statement

Korean War Air Force Captain Harry Cecil Moore piloted an F-51 Mustang night fighter, 67th Fighter Bomber Squadron. On June 1, 1951, Harry flew one of six F-51's that had been enroute to conduct reconnaissance over North Korea when the Squadron was ordered to proceed north to provide close air support for a B-29 Bomber crew that had bailed out in enemy territory near the mouth of the Yalu River. Flying at about 5,000 feet, the Squadron was attacked by six MiG-15 aircraft of the Soviet 303rd Fighter Aviation Division that had been patrolling along the river.

The Mustangs descended and split up into pairs and single flights. Harry and another Mustang flew south along the coast trying to evade the MiGs. One Mustang turned east and continued inland, while three MiGs chased Harry, hit his Mustang, which smoked, dropped, and landed gently in the Korean Gulf less than 100 feet from shore. He was taken prisoner. Communist forces transported him to the USSR, to Camp No. 18 near Potma, Mordovia, where, in 1952, he was interrogated by the Commander of Soviet 64th Fighter Aviation Corps.

On February 27, 1952, eight months after the shoot-down, the Chief of Naval Personnel wrote to the Judge Advocate General "that there is a possibility that Captain Moore survived and is now a prisoner of war." But the government did not reveal to his wife, Louis Moore, or his brother, Bob Moore, that Harry may have been alive. Instead, in December of 1953, it wrote them that Harry had been reclassified, from Missing-in-Action to Killed-in-Action.

Fifty years later, in 2002, the Pentagon informed Louis and Bob that evidence had been discovered by the US-Russia Joint Commission on POW/MIAs, relating that Harry had been a POW in the Soviet Union. A decade later, in 2013, the Department of Defense provided Louis and Bob with a copy of the Chief of Naval Personnel's February 1952 memorandum relating that Harry may have been a POW. In November of 2019, a researcher discovered a November 1953 report that "Lt Moore, fighter pilot, was interrogated at the interrogation center," in North Korea's Camp 5.

Harry Moore's story is memorialized in the documentary, *Keeping the Promise Alive*. See <https://www.youtube.com/watch?v=kma3hwFRJ1w>. American Korean War POWs who were pilots and navigators were prime candidates to be sent to the Soviet Union and China. The CIA gathered that intelligence.

Jurisdiction

1. The FOIA provides this Court jurisdiction over this matter. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

Parties

2. Plaintiff Robert Moore is an individual residing at 745 East Riverside Drive, Eagle, Idaho. Bob is Harry Moore's brother.

3. Plaintiff Jana Orear is an individual who resides at 197 Aspin Hill Court, Gardnerville, Nevada. She is Harry Moore's daughter.

4. Plaintiff Christianne O'Malley is an individual who lives in Reno, Nevada. Ms. O'Malley is Harry Moore's granddaughter.

5. Plaintiff Mark Sauter is an investigative journalist and author. He resides in Bethesda, Maryland.

6. Plaintiff Michael Austin Driggs is an individual who lives in Arlington, Virginia.

7. Defendant Central Intelligence Agency ("CIA") is an agency within the meaning of 5 U.S.C. § 552(f) of the FOIA, and is in possession and or control of the records which are the subject of this action.

Facts

8. On November 25, 2019, plaintiffs submitted a FOIA request to the CIA, seeking disclosure of 21 items. *See* FOIA Request ECF No. 9-1. The requests (except numbers 4, 5, and 6), are:

Request 1

For the period of March 16, 1954, through 1961, all records of CIA's efforts in undertaking "clandestine and covert action to locate, identify, and recover those U.S. prisoners of war still in Communist custody."

Request 2

Please provide an unredacted copy of this Report [attached January 5, 1952, *CIA Information Report*], together with all intelligence material upon which it was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.

Request 3

Please produce the [following] referenced [in attached July 15, 1952, *CIA Cross Reference Sheet*]:

- (a) July 15 1952 "Basic Communication;"
- (b) June 24, 1953 "Basic Document;"
- (c) Information described as "etcetera;"
- (d) POW information in, or otherwise "Routed to, C.I. File;"
- (e) POW information related to or bearing the "Cross Reference Number 040;" and
- (e) POW information related to or bearing the "Classification Number 383.6 Korea."

Request 7

An unredacted version of the attached July 17, 1952, three page *CIA Information Report*, the subject of which is "Prisoner-of-War Camps in North Korea and China," subtitled "War Prisoner Administrative Office and Camp

Classification," together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.

Request 8

An unredacted copy of the attached December 31, 1953, *CIA Information Report*, regarding a USSR interrogation center in Korea, where, "after interrogation PWs were taken to the USSR," together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.

Request 9

An unredacted copy of the attached March 24, 1954, *CIA Information Report* relating that "some PWs listed as missing were in fact turned over to the Soviets," and "will never be released because they will have learned too much about Soviet PW handling techniques," together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.

Request 10

The unredacted, and complete, version of the attached April 23, 1954, *CIA Information Report*, "Subject Soviet Concentration Camps in the Vorkuta Area."

Request 11

The unredacted, and complete, version of the April 27, 1954, *CIA Information Report* relating "information regarding the presence of US prisoners captured during the Korean War" in camps in Komsomolsk, Magadan, Chita, and Irkutsk, USSR, together with the materials upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports. The first page of this three-page Report is enclosed.

Request 12

The unredacted, and complete, version of the attached December 8, 1954, *CIA Information Report*, "Subject Alleged American Held in Soviet Prison."

Request 13

On January 15, 1992, an individual who had been a KGB officer from 1974 to 1984 appeared at the US Embassy in Helsinki, Finland, and reported that, to "ease his conscience," he was reporting that "three Americans were still being held in the camps of Mordovia in July 1978." The source "added that if necessary, he can provide more detailed information." For reference, a copy of the January 23, 1992 cable from Embassy Helsinki to Secretary of State is attached. Please produce any and all information related to this Report.

Request 14

A complete, and unredacted version of the attached March 9, 1988, *CIA Memorandum* to "US Army Chief, Special Office for Prisoners of War and Missing in Action," referencing two 1980 sightings and one 1988 sighting of "31 Caucasians, possibly American prisoners from the Korean war, in the fall of 1979," together with all intelligence material upon which this Report was based, including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports.

Request 15

All records relating to any of the POW/MIAs named in the attached list.

Request 16

Any and all records relating that any POW/MIAs may have been held in the prisons identified in the attached list of Russian prison camps.

Request 17

For the period beginning June of 1951, and continuing to the present time, please produce all POW records provided to, or receive from, any office of any component of the Department of Defense, including but not limited to:

- (a) CCRAK.
- (b) *Air Force 6004 Air Intelligence Service Squadron* during the tenure of "Project American."
- (c) *Missing in Action Office*, including those provided in response to the attached February 12, 1997 letter from U.S. House of Representative James Talent seeking "intelligence pertaining to American prisoners who were taken to China and the Soviet Union during the war," as well as "(a) the 389 American service members who into the 1980s were listed as unaccounted prisoners of war by the United Nations Command Military Armistice Commission (UNCMAC) and (b) all US Air Force F-86 pilots who remain unrepatriated."
- (d) *Air Force Office of Special Investigations*, or AFOSI.
- (e) *Naval Criminal Investigative Service*, or NCIS.
- (f) *Army Criminal Investigation Command*, or CID.
- (g) *U.S. Army Combined Command Reconnaissance Activities Far East*, or CCRAFE.

Request 18

All POW records prepared by any officer, agent, or employee of the CIA, prepared for the Office of the President, including the *President's Daily Brief*, or PDB, that include information on the possibility of POWs being transferred to the Soviet Union or China.

Request 19

Any records reflecting communications with Members of Congress, or Congressional oversight committees concerning the capture of American airmen during the Korean conflict who may have been transported to the Soviet Union or China and their presumed fate.

Request 20

All records concerning POWs and KGB defector Yuri (or Yury) Rastvorov, who informed the United States Government that American military personnel were taken to the Soviet Union during the Korean conflict. This request includes an unredacted version of the attached page with the heading, "Terminology."

Request 21

All intelligence material (including reports, analysis, correspondence, signals intelligence, imagery, and live sighting reports) concerning statements made by former Czech general Jan Sejna and other former Czech officials concerning US POWs held, interrogated and experiment on by Czech and Soviet advisors, and thereafter transferred to China, Czechoslovakia, East Germany and the Soviet Union.

9. By letter dated August 25, 2022, plaintiffs narrowed requests 4 through 6, regarding POW Harry Moore, to strike all references to records upon which specific statements, and documents, were based:

The Plaintiffs narrow FOIA Requests 4, 5, and 6,¹ which seek information on Harry Moore, to strike all references to records upon which specific statements and documents were based, as well as

¹ November 25, 2019, FOIA Request, ECF No. 9-1:

Request 4

All records regarding the June 1, 1951 shoot down and capture over North Korea of the American F-51 piloted by U.S. Air Force Captain Harry Cecil Moore, born February 11, 1924, in Elm Grove, West Virginia, service number AO 711850.

Request 5

All records upon which the following statement from February 27, 1952 Memo from Chief of Naval Personnel to Commanding General, Far East Air Force was based: "It is believed that there is a possibility that Captain Moore survived and is now a prisoner of war."

Request 6

All records regarding Captain Moore's incarceration and transportation from North Korea to the Soviet Union, his locations in the Soviet Union, and all evidence that he "may have been interrogated by Soviet officials."

references to his shoot-down and transport to the Soviet Union. This request is now akin to Request 15, which seeks "All records relating to any of the POW/MIAs named in the attached list."

The Request, as narrowed, should read "All records relating to POW/MIA Harry Cecil Moore."

10. Plaintiffs' FOIA request seeks defendant's productions in electronic format:

Kindly produce these records in electronic format, PDF. *See* 5 U.S.C. § 552(a)(3)(B): "In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."

11. By letter dated December 10, 2019, the CIA acknowledged receipt of plaintiffs' FOIA request, writing, in part, "This is a quick acknowledgement to advise you that we received your request for a search and review of the following records..." When plaintiffs filed their Complaint on April 20, 2020, the CIA had failed to substantively respond to plaintiffs' FOIA Request, so plaintiffs had constructively exhausted their administrative remedies under 5 U.S.C. § 552 (b)(6)(A)(i).

12. Since plaintiffs filed their Complaint, the CIA has made eight productions, two in 2020, and six in 2021. It has produced 55 records (eight of which plaintiffs had submitted with the FOIA Request seeking unredacted versions). Plaintiffs aver, *inter alia*, that the CIA's searches were inadequate, including failures to search operational record repositories and refusal to search for records reasonably described. Plaintiffs also alleged that the CIA's reviews were inadequate, including its failure to re-review previously redacted records, that it unjustifiably asserted FOIA exemptions and *Glomar* responses, and that it has a history of wrongful nondisclosures in violation of Executive Order 13526 and the mandates of its Decennial Reviews.

Count I
(Prompt Disclosure)

13. Plaintiffs restate paragraphs 1-12 as if fully repeated here.

14. Plaintiffs have a statutory right to the records they seek under 5 U.S.C. § 552 *et seq.*, and there is no legal basis for the CIA's refusal to disclose them. Plaintiffs seek prompt disclosure.

Count II
(News Media Status)

15. Plaintiffs restate paragraphs 1-14 as if fully repeated here.

16. Plaintiffs' November 25, 2019 letter requested status as a representative of the news media. The administrative record demonstrates that plaintiff Mark Sauter is entitled to a waiver of search and review fees under 5 U.S.C. § 552 (a)(4)(A)(ii)(II).

Count III
(Improper Withholding of Operational Files under 50 U.S.C. § 3141(f))

17. Plaintiffs restate paragraphs 1-16 as if fully repeated here.

18. Under 50 U.S.C. § 3141 (f)(3), "when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence."

19. Attached hereto as Exhibit A is the Affidavit former CIA official Kevin Shipp, whose expertise includes classification authority. *Shipp Aff.* ¶ 4. Mr. Shipp wrote that the CIA's nondisclosures of the records at issue violate E.O. 12356, §§ 3.3 and 3.3(a), which mandate declassification in the absence of certain exceptions which are not present in this case. *Id.* ¶¶ 7-8.

20. Mr. Shipp maintains that, [g]iven the age of these records, there is no longer any justification for continuing to treat them as 'operational records' under 50 U.S.C. § 3141." *Id.* ¶ 10.

21. CIA has "improperly withheld because of improper placement solely in exempted operational files" under 50 U.S.C. § 3141(f)(3).

22. The Affidavit of Vice-Chairman of the 1991 Senate Select Committee on POW/MIA Affairs, Senator Bob Smith, relates:

I personally have seen hundreds of classified documents that could and should be released as they pose no national security risk. What is really at risk are the reputations and careers of the intelligence officials who participated in and perpetrated this sorry chapter in American history.

Smith Aff. ECF No. 25-1 ¶ 5.

23. Responsive records sought remain undisclosed because of the CIA's improper exemption of operational files.

24. 50 U.S.C. § 3141 (f)(5) affords plaintiffs the opportunity to propound *Request for Admissions*. This discovery request is attached hereto as Exhibit B.

Count IV

Improper Considerations of Historical Value and Public Interest in Decennial Reviews of Exempted Operational Files under 50 U.S.C. § 3141(g)(2)

25. Plaintiffs restate paragraphs 1-24 as if fully repeated here.

26. 50 U.S.C. § 3141(g), *Decennial Review of Exempted Operational Files*, requires the CIA to review the exemptions in force and to "determine whether such exemptions may be removed from any category of exempted files or any portion thereof." This review "shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein." *Id.*

27. The CIA did not, in fact, consider the historical value or other public interest in conducting its Decennial Reviews. It improperly withholds records because of its failure to comply with this subsection, entitling plaintiffs to judicial review under § 3141(g)(3).

WHEREFORE, Plaintiffs respectfully pray that this Court order defendant CIA to conduct a thorough search for all responsive records in all repositories likely to contain responsive records, to fully describe that search, to disclose the fruits of that search, and to pay plaintiffs reasonable costs and attorneys' fees incurred in their prosecution of this action under 5 U.S.C. § 552 (a)(4)(E) and 28 U.S.C. § 2412(d).

DATE: August 25, 2022.

Respectfully submitted,

/s/ John H Clarke
John H. Clarke Bar No. 388599
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
Fax (202) 332-3030
john@johnhclarkelaw.com
Attorney for Plaintiffs