

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.                   | ) |                                |
| _____                        | ) |                                |

PLAINTIFFS' REPLY TO DEFENDANT'S  
OPPOSITION FOR LEAVE TO AMEND COMPLAINT

COME NOW Plaintiffs Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter, by counsel, and respectfully submit this memorandum in reply to Defendant CIA's Opposition to Plaintiffs' Motion for Leave to Amend their Complaint.

Defendant argues that allowing plaintiffs to amend their complaint (1) would not conserve judicial resources, (2) would be futile, and (3) would delay dispositive motions and plaintiff should have initially pled improper placement in exempted operational files.

**(1) Judicial Economy**

A denial of the relief sought would needlessly expend judicial resources. Plaintiffs' motion cites *Trans-Pacific Policing v. U.S. Customs*, 177 F.3d 1022, 1023 (D.C. Cir. 1999), where the District Court had not allowed plaintiffs to narrow their request during litigation, which would have required plaintiff to again file suit. The Court of Appeals reversed, recognizing that a refiling would "be costly in terms of additional time, expense, and wasted judicial resources." Defendant does not attempt to distinguish this authority.

In 2013, plaintiffs produced their documentary, *Keeping the Promise Alive*. The referenced promise is to undertake all efforts to find out all they can about what happened

to Harry Moore. There is no reason to force Harry's brother, daughter, and granddaughter to file a fourth FOIA lawsuit to litigate the CIA's search of alleged "operational files" for information on his fate.<sup>1</sup> The CIA argues that the relief sought would not conserve judicial resources, even while stating that "if Plaintiffs seek to advance new claims at an appropriate time, they may do so in a future case." CIA Opposition, ECF 44 at 9.

**(2) Futility**

Defendant is silent on the question of whether narrowing the request seeking information about Harry Moore would be futile. Rather, it asserts only that the proposed complaint does not meet the requirements of 50 U.S.C. § 3141.

Defendant asserts that the National Security Act requires plaintiffs to submit an affidavit averring improper placement solely in exempted operational files—based on "personal knowledge." CIA Opposition, ECF 44 at 8-9. But the statute requires either "personal knowledge or otherwise admissible evidence." 50 U.S.C. § 3141(f)(3). The CIA fails to address whether Mr. Shipp's expert affidavit is "admissible evidence."

The CIA also declares, without explanation, that the Affidavit "fails to meet the requirements" of 50 U.S.C. § 3141(f)(3). *Id.*

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<sup>1</sup> See, e.g., *Robert Moore Aff.*, ECF No. 25-3 ¶ 5: We attended around 30 meetings of the Defense POW/MIA Accounting Agency, held in various cities all over the nation. In 2013, we released *Keeping the Promise Alive*, a documentary on Harry's case and our search for him. Over the years, we advocated for families of the over 7,500 service personnel still missing from the Korean War. This case is one of three Freedom of Information Act lawsuits that we have filed.

**(3) Alleging Improper Placement in Operational Files**

The CIA took over a year to produce records. During this time, defendant's counsel told the undersigned that the CIA would not be asserting a *Glomar* response, and that the CIA was searching its records. Nor did CIA assert *Glomar*, or reference operational files, in any of its cover-letters transmitting records. When the CIA submitted its dispositive motion, plaintiffs first learned that, contrary to these representations, the CIA was asserting *Glomar*, and that it conducted no search of its (supposed) operational files. Contrary to the CIA's version, that was last December, not 29 months ago.

Defendant cites *Hall v. Cent. Intel. Agency*, No. 04-cv-814, 2022 WL 2528102, at \*1 (D.D.C. July 7, 2022) for the proposition that plaintiffs' counsel knew or should have known that 50 U.S.C. § 3141(f) mandates that plaintiff fulfill certain requirements to challenge the propriety of classifying records as operational. In *Hall*, this Court held:

But § 314.1 does not categorically absolve CIA from searching its operational records. When a FOIA requester "disputes" the adequacy of CIA's search "with a sworn written submission based on personal knowledge or otherwise admissible evidence" suggesting "improper exemption of operational files," a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)-(B); accord, e.g., *Judicial Watch, Inc. v. Cent. Intelligence Agency*, 310 F. Supp. 3d 34, 41-42 (D.D.C. 2018) (Jackson, K.B., J.). Plaintiffs do so here with-among other things-an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding documents that should be declassified"; and that "should and should be released as they pose no nation security risk." Aff. Bob Smith ¶¶ 8, 20, ECF No. 258-4.

*Memorandum and Order*, August 2, 2019. ECF No. 340.

Senator Smith's Affidavit in this case states:

I personally have seen hundreds of classified documents that could and should be released as they pose no national security risk.

After decades of FOIA requests, emotional appeals from family members, senators and congressmen, and House and Senate Committee investigations, the intelligence agencies still keep numerous documents classified under the guise of national security. I can state without any evocation that they are still holding documents that should be declassified.

*Smith Aff.* ECF No. 25-1 ¶¶ 5, 7.

While plaintiffs do not question the Court's holding that Senator Smith's Affidavit here does not trigger an inquiry under § 3141(f), plaintiffs had no reason to know that, given the Court's holding in *Hall*. The Amended Complaint in *Hall*, ECF No. 45, is silent on § 3141(f).

CONCLUSION

The Court's acceptance of the proposed Amended Complaint would undoubtedly conserve judicial resources. "The court should freely give leave when justice so requires." Federal Rule of Civil Procedure 15(a)(2).

WHEREFORE, Plaintiffs Robert Moore, Jana Orear, Christianne O'Malley, and Mark Sauter respectfully pray that this Court grant *Plaintiffs' Motion for Leave to Amend Complaint*.

Date: September 22, 2022.

Respectfully submitted,

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