

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

LOIS MOORE, et al.,	)	
	)	
Plaintiffs.	)	
	)	
v.	)	Case No. 20-1027 (RCL)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S  
MOTION TO VACATE COURT'S SCHEDULING ORDER

COME NOW plaintiffs, by counsel, and respectfully submit this response to defendant's Motion to Vacate the Court's June 10 Scheduling Order.

The Court's Order, ECF No. 7:

Local Rule 16.3(b)(10) exempts parties to a FOIA action from typical scheduling order requirements. Instead, the government has the burden to produce a *Vaughn* index with a supporting dispositive motion. The Court therefore ORDERS the government to file the index and supporting motion within 30 days.

*Defendant's Motion to Vacate Court's Order of June 10, 2020, Setting Vaughn Index and Briefing Schedule ("CIA Motion"), ECF No. 8:*

WHEREFORE, for the foregoing reasons, because CIA is still processing Plaintiffs' FOIA request and the matter is not yet ripe for a dispositive motion, it is respectfully requested that the Court vacate its June 10, 2020 order and order the filing of a status report on or before August 25, 2020.

Memorandum of Points and Authorities

1. While the CIA does, it appears, have good cause to seek relief, its prayer to simply apprise the Court of its progress in a few months is not justified, and contrary to the interests of justice in this matter.

2. The CIA notes that "the breadth of plaintiffs' requests in this case and the historical nature of the records sought complicates CIA's processing in this matter." *CIA Motion* ¶ 5. However, plaintiffs seek to have the CIA timely process items that involve no search whatsoever.

3. Of the 21 items at issue, three seek information regarding Korean War POW Harry Cecil Moore,<sup>1</sup> and nine seek unredacted versions of CIA records that plaintiffs had submitted with their FOIA request. These items require no search.

#### Redacted Records

4. Plaintiffs seek unredacted copies of six CIA Information Reports,<sup>2</sup> a CIA Memorandum, and a CIA cover page.<sup>3</sup> Attach hereto as Exhibit 1 is a copy of plaintiffs' FOIA request to the CIA, which attaches these eight records. CIA need not search for them.

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<sup>1</sup> Request 4, seeking "records regarding the June 1, 1951 shoot down and capture; Request 5, for records upon which statement, "there is a possibility that Captain Moore survived and is now a prisoner of war," was based; and Request 6, "records regarding Captain Moore's incarceration and transportation from North Korea to the Soviet Union... and all evidence that he "may have been interrogated by Soviet officials."

<sup>2</sup> Request 2, attaching redacted version of the January 5, 1952, *CIA Information Report*; Request 7, attaching redacted July 17, 1952, *CIA Information Report*; Request 8, attaching redacted December 31, 1953, *CIA Information Report*; Request 9, attaching redacted March 24, 1954, *CIA Information Report*; Request 10, attaching redacted April 23, 1954, *CIA Information Report*; Request 11, attaching redacted April 27, 1954, *CIA Information Report*.

<sup>3</sup> Request 14, attaching redacted March 9, 1988, *CIA Memorandum*; Request 20, attaching redacted version of page with the heading, "Terminology."

Records regarding Harry Moore

5. So too with the records regarding Harry Moore. Defendant has already searched for these records in *Mark Sauter et al. v. Department of State, et al.*, CA No. 17-1596 (hereinafter "*Moore I*"). Yet, defendant posits that this circumstance mandates that it will need more time to respond. "Plaintiffs' FOIA request contains requests that are identical or substantially similar to a prior request in which this Court upheld the response of CIA, thereby imposing an additional layer of review to determine if any further search or review need to be conducted." *CIA Motion* ¶ 5.

6. This is not so. And the Court did not "uphold" the CIA's Glomar response. Rather, the Court upheld only the adequacy of CIA's search.

7. In *Moore I*, the CIA had "asserted a partial Glomar response in conjunction with Exemptions 1 and 3 as to parts 1, 6, and 7 and a full Glomar for item 8 of Plaintiffs' request." *Shiner Dec.*, ECF No. 30-8 ¶ 8. The referenced requests:

(1) USAF Captain Harry Cecil Moore ("Capt. Moore"), service number AO 711850. Capt. Moore was born in Elm Grove, West Virginia, on February 11, 1924. Further biographical information is set forth below.

\* \* \*

(6) Any records involving communications or discussions concerning or memorializing how DoD will, should and/or did respond, whether verbally or in writing, to relatives of Capt. Moore regarding his known status in 2002 and to the present.

(7) Any records describing or discussing how DoD pursued leads involving Capt. Moore and other POWs reported in the Soviet Union since 2000.

\* \* \*

(8) Any records reflecting or discussing correspondence or communications since January 1, 2007, with countries formerly under Soviet control, including, but not limited to, Poland, Hungary, Latvia, and the Czech Republic on America POW/MIAs from the Korean conflict.

*Moore I, Amended Complaint*, ECF No. 12 ¶ 24.

8. Plaintiffs did not contest the CIA's Glomar response,<sup>4</sup> as the Court noted in its July 30, 2020 *Memorandum Order*, ECF No. 47 at 2:

Additionally, plaintiffs concede the appropriateness of the Glomar response made in reliance upon exemptions one and three... As such, this court need only consider the adequacy of the searches conducted by the DIA, CIA, and USAF... CIA conducted an adequate search.

9. As plaintiffs did not litigate the propriety of the CIA's Glomar response in *Moore I*, estoppel, or issue preclusion, is not present in this case. Issue preclusion requires three elements: (1) "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case;" (2) "the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case;" and (3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. DOJ*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp.*, 961 F.2d at 254). While this matter involves the same issue, it was not litigated, and was not decided. So, plaintiffs are not foreclosed from challenging any Glomar response made in reliance upon Exemptions 1 and 3. Plaintiffs may, however, be collaterally estopped from challenging the adequacy of certain aspects of the CIA's search, which has been litigated, and ruled upon.

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<sup>4</sup> See *Plaintiffs' Opposition to Motion for Summary Judgment*, ECF No. 34 at 1: "Upon review of the Defendants' Motion, the Plaintiffs have chosen to concede the appropriateness of the Glomar response made in reliance upon Exemptions 1 and 3." See also *CIA Motion for Summary Judgment*, ECF No. 45 at 7: "Note that the CIA also asserted a Glomar response for one subpart of the request—subpart 8—as well as a partial Glomar response to subparts 1, 6, and 7... But as noted, Plaintiffs have expressly conceded that issue."

10. Thus, there is no reason for the CIA to postpone its response to the request for information on Harry Moore. It has already conducted that search.

Glomar Response

11. The CIA did not assert Glomar in its Answer, ECF No. 6, nor in its December 10 response to plaintiffs' FOIA request, writing only that "CIA officers will review and process your request in more detail and will only communicate to you if they should encounter any problems or if they cannot begin the search without additional information or clarification." But CIA has indicated that it may, in fact, assert this defense in this case, as it did in *Moore I*.

12. Plaintiffs do not seek to litigate the Glomar issue at this juncture. Rather, they seek CIA's cooperation in not litigating the issue at all.

13. In *Moore I*, the CIA posited that "requiring the CIA to confirm or deny the existence of responsive records about classified affiliations would reveal classified information protected by FOIA Exemptions 1 and 3." *Defendant's Memorandum in Support of Motion for Summary Judgment*, ECF 30-1 at 20. Relying on Exemption 1, defendant asserted that "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security," and that "confirming or denying the existence of such records would tend to reveal intelligence activities (including covert action), or intelligence sources and methods." *Id.* Relying on Exemption 3, the CIA wrote that the information satisfied the criteria for records specifically exempted from disclosure by the National Security Act of 1947, and that confirming or denying the existence of responsive records would "reveal information that concerns intelligence sources and methods." *Id.* at 21-22.

14. "[C]onfirming or denying the existence of records showing a classified connection to a particular individual, like Captain Moore," according to CIA, "reasonably could be expected to cause serious damage to U.S. national security by indicating whether or not CIA maintained any human intelligence sources related to an interest in the subject of the request." *Shiner Dec.* ECF 30-8 ¶ 16. "Conversely, confirming the nonexistence of such information may identify a lack of an intelligence interest or reveal gaps in CIA's intelligence-gathering capabilities that could be exploited by our adversaries." *Id.* ¶ 17.

15. But plaintiffs' FOIA request alone demonstrates that CIA has long since acknowledged its intelligence interest in the matter, and its use of human intelligence. Plaintiffs' FOIA request quotes then CIA Director Alan Dulles's March 1954 letter to General Nathan Twining's request for "appropriate operating organizations for clandestine and covert action to locate, identify, and recover those U.S. prisoners of war still in Communist custody." Dulles responded, "The Agency has had a continuing requirement for the development of information on the location of U.S. POWs. Any intelligence developed on this subject will be discussed promptly with headquarters, United States Air Force." Exhibit 1 at 2.

16. FOIA Request 17 seeks CIA records regarding the *Combined Command for Reconnaissance Activity Korea*, or "CCRAK." The preamble to that request is an excerpt from *Clandestine Services History* Historical Paper No. 52, "The Secret War in Korea," written in 1964, declassified 2007, as it appears on the CIA's website:

By the fall of 1951, CIA Headquarters recognized there were great opportunities if more experienced CIA officers were in Korea. Accordingly, three of the most competent senior clandestine services officers in the Agency were selected: one to be full-time CIA representative and Deputy of CCRAK, another as head of CCRAK's counterintelligence section and doubling

as Chief of CIA's counterespionage staff, and the third as Chief of foreign intelligence activities.

*Id.* at 7.

17. Plaintiff's Request 3 seeks disclosure of records underlying a July 15, 1952 CIA *Cross Reference Sheet*, titled, "Location of Certain Soviet Transit Camps for POW from Korea, Classification Number 383.6 Korea," a copy of which plaintiffs attached. Exhibit 1 at 14.

18. The nine records that plaintiffs seek in unredacted form are all CIA records.

19. Thus, CIA's "intelligence interest" in the records is the aged records is well-documented. *See also, e.g.*, Senate Select Committee on POW/MIA Affairs (1989 to 1993) 54-page Report, *Chronology of Policy and Intelligence Matters concerning Unaccounted for US Military Personnel at the End of the Korean Conflict and During the Cold War*, November 10, 1992.

20. Moreover, defendant must produce records corresponding to "officially disclosed" information. *See Wolf v. CIA*, 473 F.3d 370 (2007), addressing official acknowledgment in the Glomar context, holding that the CIA had waived its right to issue a Glomar response because former CIA director had publicly acknowledged existence of certain CIA records in congressional testimony. "[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

#### Relief Sought

21. All told, plaintiffs FOIA request requires CIA to conduct several searches. Plaintiffs seek, *inter alia*, (1) intelligence materials associated with the nine records that

plaintiffs seek in unredacted form, (2) records regarding its attached list of POWs, as well as (3) records concerning plaintiffs' list of Soviet POW camps.

22. Plaintiffs do not contest that defendant would be hard-pressed to complete its searches by July 10, and, so, do not oppose the CIA's request to vacate the Court's June 10 Order. And plaintiffs do not oppose CIA's prayer that it have until August 25 to file a Status Report on or before August 25, 2020, including a schedule for submission of a *Vaughn* index and dispositive motions.

23. But plaintiffs ask that the CIA also be ordered to respond by August 25 to the two inquiries in which no search is required. A proposed order is attached.

24. For 60 years, the government withheld information from Harry Moore's wife, and his brother, that Harry had been a POW, as plaintiffs related in their Complaint:

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, Lois 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.... [I]n 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.

*Complaint*, ECF No. 1, Preliminary Statement.

25. Plaintiffs hope that the CIA would review the merits of asserting Glomar in response to their request for information on Harry Moore, and make a discretionary release of this information. A Glomar response would seem frivolous, would result in needless delay, and may result in plaintiffs seeking leave to bifurcate the matter to adjudicate the issue before the CIA completes its search. Plaintiff Lois Moore is 92-years old, and plaintiff Robert Moore is 94.



