

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL SECURITY COUNSELORS, *

*

Plaintiff, *

*

v. *

Case: 1:11-cv-00443 (BAH)

*

CENTRAL INTELLIGENCE AGENCY, *

*

Defendant. *

*

* * * * *

**PLAINTIFF’S MOTION FOR SUPPLEMENTAL STATUS CONFERENCE
REGARDING COUNT 3 AND ELECTRONIC RECORDS**

After reviewing Defendant’s Supplemental Memorandum (filed Jan. 13, 2012) and Supplemental Declaration of Susan Viscuso (filed Jan. 13, 2012) (“Viscuso Supplemental Declaration”), Plaintiff respectfully requests a supplemental status conference to dispute several of the legal and factual statements made in these filings. Defendant has chosen its words very carefully to appear to answer the Court’s questions without actually answering the Court’s questions, in several ways.

First and foremost, Ms. Viscuso’s statement that “all CIA systems of records are located on the Agency’s classified system” (Viscuso Supp. Decl. ¶¶ 4, 12) may be factually accurate but completely irrelevant. Defendant argued to Judge Gerald Bruce Lee in the U.S. District Court for the Eastern District of Virginia that the term “systems of records,” when used in a FOIA request, was ambiguous and confusing because the only definition for that term was in the Privacy Act. *See* Mem. Supp. Def.’s Mot. Summ. J. at 9, *James Madison Proj. v. CIA*, No. 08-1323 (E.D. Va. Mar. 18, 2009), attached as Ex. I. Specifically, Defendant argued:

Plaintiff's reference to "System of Records" subject to FOIA is confusing because the term "system of records" is a statutory term used in the Privacy Act, not in FOIA. The Privacy Act defines a "system of records" as "a group of any records under the control of the agency from which information is retrieved by name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). If CIA were to apply the Privacy Act meaning to "Systems of Records," there would be no records responsive to this item because plaintiff has expressly excluded all documents pertaining to the CIA's Privacy Act Systems of Records from the scope of the request.

Id. See also Tr. of Hrng. of 5/7/09 at 6:14-21, *James Madison Project* ("[S]ystem of records is not a term that's really used for FOIA. It's used in the Privacy Act area. And under the Privacy Act, they define it as basically any sort of group of records that you have. And that, for privacy purposes, . . . it's records that pertain to a person that can be retrieved by a person's name.

But, it's not really clear what a system of records is.") (emphasis added), attached as Ex. K.

Therefore, while it may be true that all CIA *systems of records* are located on the classified system, the Court must consider the fact that Defendant has previously argued that it "is confus[ed]" by the term "system of records."¹ Ms. Viscuso did *not* say that "all CIA *records* are located on the classified system." In fact, she could not say that, because if that were the case,

¹ To be completely accurate, Ms. Viscuso's declaration in *James Madison Project* did state that the CIA applied a more general definition to the term "system of records" in its processing of that request, but that does not change the fact that the actual memorandum of law filed by the government with the Court argued that this term was inherently "confusing" in a FOIA context, and that the government reargued the point in an oral hearing. The Court should not allow Defendant to argue that a term is confusing in one FOIA case and then use that same term in another FOIA case. The Court should require Ms. Viscuso to either state under oath, "all CIA records are located on the classified system," or explain why records that are on the unclassified system are transferred to the classified system for FOIA processing.

why would the CIA even *have* an unclassified system (which it acknowledges elsewhere in the Viscuso Supplemental Declaration)?²

Secondly, Defendant states that all of the Tables of Contents requested by Plaintiff “were stored, searched, located, and redacted on the CIA’s classified system.” (Viscuso Supp. Decl. ¶ 6.) However true this may be, it is similarly misleading. As stated in the Status Conference on 16 December 2011, two of the Tables of Contents released to Plaintiff were already available on the CIA public website. Compare Ex. K, with <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/95unclass/index.html> and <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/96unclass/index.html>. Nonetheless, Defendant argues that *documents on the public website* are stored and located on the classified system. While it may be true that the CIA only *searched* the classified system, that has no bearing on whether the documents were *also* located on the unclassified system, and the CIA *chose* to only search for copies that it “could not readily reproduce” because they were located on the classified system. Other examples of records that have no business being only located on the classified system and yet were still determined not to be “readily reproducible” are:

- A copy of the court opinion in *Feinman v. FBI*, No. 09-2047, 2010 WL 276176 (D.D.C. Jan. 26, 2010) – Request No. F-2010-01683

² On a related matter, the Viscuso Supplemental Declaration also includes an even more troubling statement, namely, that “as required by the FOIA, the CIA searches *these systems of records* for information responsive to FOIA requests.” (Viscuso Supp. Decl. ¶ 4.) If the CIA only searches Privacy Act Systems of Records (or even only some other subset of the totality of its records) in response to FOIA requests, then it is blatantly violating FOIA. That such a subset of its records purportedly only exists on its classified system merely exacerbates the problem.

- A copy of the Privacy Act Systems of Records Notice from the *Federal Register* – Request No. F-2011-00682 (currently the subject of the related case *National Security Counselors v. CIA*, No. 11-444)
- A copy of the Privacy Act Systems of Records Notice from the *Federal Register* and a copy of the CIA FOIA regulations from the Code of Federal Regulations – Request No. F-2010-00599 (currently the subject of the related case *National Security Counselors v. CIA*, No. 11-445)³
- A copy of the CIA Mandatory Declassification Review regulations from the Code of Federal Regulations – Request No. F-2010-01033 (currently the subject of the case *National Security Counselors v. CIA*, No. 11-442 (RMC))

Defendant’s implication that the above listed records could be considered to be subject to the “mosaic” effect or the proper subject of a *Glomar* response (Viscuso Decl. ¶¶ 8-9) is as unreasonable as the suggestion that these records might contain classified information. Plaintiff does not dispute that many unclassified records may properly be covered by these concepts, but it is undeniable that there are *still* several types of records that no reasonable person could *ever* consider in such a fashion, such as published regulations, published court opinions, and the like. Nevertheless, Defendant stubbornly argues that it must keep these records on the classified system or risk harming national security. This argument is without merit.

³ Because this practice is a point of controversy in all three of the related cases currently before this Court, Plaintiff requests that the next status conference, if one is ordered, encompass all three cases and not be limited solely to the facts in this case. Otherwise, the parties will have to reargue the same points each time the question of electronic records arises in these three cases (which will be several), which would prove unnecessarily repetitive for all parties involved and not in the interest of judicial economy.

Thirdly, Defendant reliably and persistently cites its “unique clandestine foreign intelligence mission” which sets it apart from “other federal agencies that are also subject to the FOIA.” (*Id.* ¶ 10.) However, it equally reliably and persistently refuses to explain why it should be considered in contrast to other federal agencies with clandestine foreign intelligence missions, such as the National Security Agency, National Geospatial-Intelligence Agency, Office of the Director of National Intelligence, and National Reconnaissance Office, all of which still manage to produce electronic records in response to FOIA requests. Admittedly, the CIA is *rare* among federal agencies for these reasons, but it is by no means *unique*. In fact, the only thing that makes it unique among federal agencies is that it refuses to provide electronic records as a *blanket policy*. Plaintiff has not discovered a single other federal agency with such a policy, and it is hardly one that Defendant should be able to cite to unilaterally opt out of its legal responsibilities under FOIA.

Lastly, Defendant is adopting an overly broad interpretation of the requirement that “Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of *this section*.” 5 U.S.C. § 552(a)(3)(B) (emphasis added). Defendant has reduced this critical requirement to one where it must maintain the records in such a way that they are reproducible, *period*. (*See* Def.’s Supp. Mem. at 2 (“In determining whether an agency has met this requirement, courts look at whether agency records can be reproduced, not whether they can be readily reproduced in the format requested by a particular requester.”)) However, this lies in direct opposition to the opinion stated by this Court on 16 December 2011:

I read that agency obligation in conjunction with its obligation to produce documents to the extent that the documents are readily reproducible in the format requested by requestors

(Tr. of Status Conf. of 12/16/11 at 20:22-25, attached as Ex. L.) Defendant is defining “this section” to mean the entirety of FOIA, while the clear meaning of this term pertains solely to the “form or format” provision, based on standard rules of statutory interpretation. The Court would be hard-pressed to identify *any* type of record that is not reproducible in *some* format. Without entering into a lengthy discussion of statutory interpretation principles, Defendant’s definition renders this amendment “insignificant, if not wholly superfluous.” *Duncan v. Walker*, 533 U.S. 167, 167 (2001). Such a reading violates one of the central canons of statutory construction: “This Court’s duty to give effect, where possible, to every word of a statute makes the Court reluctant to treat statutory terms as surplusage.” *Id.* (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).

For the above reasons, Plaintiff requests a supplemental status conference, and further requests that the scope of the supplemental status conference be expanded in the interest of judicial economy to include all of the CIA FOIA requests at issue in the related cases *National Security Counselors v. CIA*, No. 11-444, and *National Security Counselors v. CIA*, No. 11-445. Defendant opposes this Motion in its entirety, arguing that a second status conference is unnecessary, and specifically opposes the inclusion of other FOIA requests in the status conference should the Court grant this Motion. Because Defendant’s counsel will be unavailable between 21-30 January 2012, Plaintiff stipulates that the status conference would take place no sooner than February.

Date: January 17, 2012

Respectfully submitted,

/s/ Kelly B. McClanahan
Kelly B. McClanahan, Esq.
D.C. Bar #984704
National Security Counselors
1200 South Courthouse Road
Suite 124
Arlington, VA 22204
301-728-5908
240-681-2189 fax
Kel@NationalSecurityLaw.org

Counsel for Plaintiff

EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES MADISON PROJECT)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:08-cv-1323
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The focus of this action is on a vague and unduly burdensome request submitted by plaintiff James Madison Project to the Central Intelligence Agency ("CIA") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff requests six categories of records. The first four categories consist of "all internal [CIA] documents pertaining" to (1) the CIA's organizational structure, (2) the indexing and organizational structure of its record systems subject to FOIA, (3) components which are tasked with FOIA requests, and (4) the search tools and indices employed by each CIA component when processing FOIA requests. See Exhibit 1 to Declaration of Delores M. Nelson ("Nelson Decl.") (Exhibit A). The fifth and sixth categories of documents sought by plaintiff relate to comments plaintiff had submitted in a proposed rulemaking and any other records that pertain to the subject matter of its recommendations. Id.

The CIA is entitled to judgment as a matter of law because it has fully complied with its obligations under the FOIA. The CIA properly denied plaintiff's request with respect to the first four categories of records. Under the FOIA, a request must "reasonably describe[]" the records

sought. 5 U.S.C. § 552(a)(3)(A). Categories one to four of plaintiff's request fail to comply with this requirement because they do not describe a specific category of documents sufficiently to enable a professional employee familiar with the subject to locate the documents with a reasonable effort. They are vague and, if read broadly, would impose an unreasonable burden on the CIA. For example, the second category of records sought by plaintiff -- all documents pertaining to the CIA organizational structure -- contains no limitations with respect to either a particular type of document or its location. References to CIA's organizational structure could be found in almost any type of document in any office of the CIA. Requiring the CIA to conduct such a sweeping search would impose an undue burden. Plaintiff's first, third and fourth categories of records present similar problems. Accordingly, the CIA properly denied plaintiff's request with regard to categories one to four.

With respect to categories five and six, defendant is also entitled to judgment as a matter of law. Those categories sought documents relating to the comments submitted by plaintiff in response to CIA's proposed rule amending its FOIA regulations. In response to those requests, the CIA conducted a thorough search of the Information Management Service ("IMS"), the office of the CIA which initiated and is responsible for the proposed rulemaking. As a result of that search, the CIA found no responsive documents. This search was reasonable because the IMS is the only office which was likely to have any responsive documents; it was the office which issued the rulemaking, received the comments, and would have analyzed plaintiff's comments.

Accordingly, this Court should grant defendant's motion for summary judgment.

STATEMENT OF MATERIAL UNDISPUTED FACTS

By a letter dated September 2, 2008, plaintiff submitted a FOIA request to the CIA.

Nelson Decl., ¶ 12. In that request, plaintiff sought "copies of all internal [CIA] documents pertaining to" the following:

- (1) the indexing and organizational structure of all CIA Systems of Records subject to FOIA, especially with respect to which Systems of Records are held by which CIA components (*excluding the Privacy Act Systems of Records detailed in the 22 July 2005 Federal Register*);
- (2) all or part of the CIA's current organizational structure (*excluding the National Clandestine Service*), especially organizational charts, outlines, or other graphic representations;
- (3) which CIA components are tasked with FOIA requests by CIA Information Management Services ("IMS"), especially with respect to which CIA offices are considered "components" by IMS for tasking purposes;
- (4) the search tools and indices employed by each CIA component from (3) above when processing FOIA requests;
- (5) discussions of the first and second recommendations made by JMP on 18 May 2008;
- (6) any other records pertaining to the subject material of the first and second JMP recommendation of 18 May 2008.

Exhibit 1 to Nelson Decl. On September 25, 2008, the CIA sent plaintiff a letter acknowledging receipt of the request. Nelson Decl., ¶ 13.

The CIA responded to plaintiff's request on February 10, 2009. *Id.* ¶ 28. In its letter, the CIA found that with respect to category one through four, plaintiff had failed to "reasonably describe" the information sought. Exhibit 3 to Nelson Decl. The CIA also stated that "the CIA is exempt from the provisions of any law requiring the publication or disclosure of the CIA's organization or functions, or requiring disclosure of the names or official titles of CIA

personnel." Id. (citing 50 U.S.C. § 403g). Thus, the CIA explained that

even if [plaintiff] restated the information [it] request[s] in items 1 through 4 with greater specificity to enable professional employees to conduct a reasonable search, any information disclosing the CIA's organization or functions is exempt from disclosure on the basis of Section 6 of the CIA Act and FOIA exemption (b)(3).

Id.

With respect to the records sought by categories five and six regarding the comments filed by plaintiff in response to a proposed rulemaking, the CIA stated that it conducted a thorough search for any information responsive to those items but did not locate any responsive material. Id.

STANDARDS FOR SUMMARY JUDGMENT

In general, summary judgment is appropriate if "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). To obtain summary judgment in a FOIA action, an agency must show that, viewing the facts in the light most favorable to the requester, there is no genuine issue of material fact with regard to the agency's compliance with the FOIA. See Wickwire Gavin P.C. v. USPS, 356 F.3d 588, 591 (4th Cir. 2004); Steinberg v. Department of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994). FOIA cases are properly resolved on summary judgment after the agency has responded to the request. Hanson v. USAID, 372 F.3d 286, 290 (4th Cir. 2004); Wickwire v. Gavin, 356 F.3d at 590. The court may award summary judgment based solely upon the information provided in affidavits or declarations when the affidavits or declarations describe the search conducted and explain the basis for its response. Military Audit Project v. Casey, 656

F.2d 724, 738 (D.C. Cir. 1981). Agency declarations are to be accorded a presumption of good faith. See, e.g., Bowers v. U.S. Dep't of Justice, 930 F.2d 350, 357 (4th Cir. 1991).

ARGUMENT

I. PLAINTIFF FAILED TO REASONABLY DESCRIBE THE RECORDS SOUGHT IN CATEGORIES ONE TO FOUR.

A. A FOIA Request Must "Reasonably Describe" the Records Sought.

A request under the FOIA must "reasonably describe[]" the records sought. 5 U.S.C. § 552(a)(3)(A). The legislative history indicates that the description "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." H. Rep. 93-876, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271. Accord S. Rep. 93-854, 93d Cong., 2d Sess. 10 (1974) (FOIA is not intended to "authorize broad categorical requests where it is impossible to determine what is sought"). See also Kowalczyk v. Department of Justice, 73 F.3d 386, 388 (D.C. Cir. 1996) (A request reasonably describes records if "the agency is able to determine 'precisely what records are being requested.'" (quoting Yeager v. Drug Enforcement Administration, 678 F.2d 315, 326 (D.C. Cir. 1982); Marks v. U.S. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978) ("Broad, sweeping requests lacking specificity are not permissible.").

The CIA FOIA regulations track this statutory requirement. The CIA requires that the request "reasonably describe the records of interest." 32 C.F.R. § 1900.12. The regulations state that

[t]his means that the documents must be described sufficiently to enable a professional employee familiar with the subject to locate the documents with a

reasonable effort. Commonly this equates to a requirement that the documents must be locatable through the indexing of our various systems. Extremely broad or vague requests or requests requiring research do not satisfy this requirement.

Id. See also 32 C.F.R. § 1900.02(m) (stating that "reasonably described records means a description of a document (record) by unique identification number or descriptive terms which permit an Agency employee to locate documents with reasonable effort given existing indices and findings aids").

Courts have explained that the "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,"¹ or to allow requesters to conduct "fishing expeditions" through agency files.² Based on these concerns, courts have found that requests fail to meet the "reasonably described" requirement for various reasons.

First, the description may be too vague to allow the agency to determine precisely what records are being requested. "An agency is not required to have 'clairvoyant capabilities' to discover the requester's need." Hudgins v. I.R.S., 620 F. Supp. 19, 21 (D.D.C. 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987). Accord Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H), P 82,022 (E.D. Va. 1981). For example, in Mason v. Calloway, 554 F.2d 129, 131 (4th Cir. 1977), the court held that plaintiff's request for "all correspondence, documents, memoranda, tape recordings, notes and any other material pertaining to the atrocities committed against plaintiffs" failed to reasonably describe the records sought. The court found that this request "typifies the

¹ Assassination Archives & Research Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 1990).

² Immanuel v. Sec'y of the Treasury, No. 94-884, 1995 WL 464141, *1 (D. Md. Apr. 4, 1995), aff'd, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision).

lack of specificity that Congress sought to preclude in the requirement of 5 U.S.C. § 552(a)(3) that records sought be reasonably described." *Accord Sands v. United States*, No. 94-0537, 1995 WL 552308, *5 (S.D. Fl. June 19, 1995) (request failed to reasonably describe records where the agency "could not comprehend the nature of any records responsive to the request"); *Hudgins v. I.R.S.*, 620 F. Supp. at 22 (request for documents describing the purpose and effects of an individual's social security number on the terms of rights, benefits and privileges under the Social Security Act failed to reasonably described the documents sought).

Second, a request fails to meet the "reasonably described" requirement when it "requires an agency to answer questions disguised as a FOIA request." *Hudgins*, 620 F. Supp. at 21. For example, in *DiViao v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978), plaintiff contended that he was entitled under the FOIA to require the CIA to reveal whether any of its agents had taken photographs of him, and, if so, whether it disseminated them to others. The court held that this request was not a permissible request under FOIA because it required the agency to respond to questions. *Accord Lamb v. IRS*, 871 F. Supp. 301, 304 (E.D. Mich. 1994).

Third, a request fails to "reasonably describe" the records sought when [it] would require the agency to conduct an unreasonably onerous search of a large volume of records in order to identify and locate the responsive documents. *See, e.g., Dale v. I.R.S.*, 238 F. Supp. 2d 99, 105 (D.D.C. 2002) (finding that a FOIA request for any and all documents that refer or relate in any way to the requester was subject to dismissal because the "request amounted to an all-encompassing fishing expedition of files at IRS offices across the country," and did not permit an IRS employee to locate the records with a reasonable amount of effort); *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (finding that a FOIA request that required a search of every

FBI field office would not reasonably describe the records sought). Requests for "all documents 'relating to' a subject is usually subject to criticism as overbroad since life, like law, is a 'seamless web,' and all documents 'relate' to others in some remote fashion." *Commonwealth of Mass. v. U.S. Dept. of Health & Human Serv.*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989). Such a request "unfairly places the onus of non-production on the recipient of the request and not where it belongs – upon the person who drafted such a sloppy request." *Id.*

Finally, even in situations where the FOIA request actually does describe documents with "sufficient precision to enable the agency to identify them," the agency still need not comply with a request that is "so broad as to impose an unreasonable burden upon the agency" *Am. Fed. of Gov't Employees, Local 2782 v. U.S. Department of Commerce*, 907 F.2d 203 at 209. For example, in *Am. Fed. of Gov't Employees, Local 2782*, plaintiff sought "every chronological file and correspondent file, internal and external," for *every* office in the Census Bureau and "every division or staff administrative office file in the Bureau which records, catalogues, or stores SF-525 or stores promotion recommendations memos, or both." *Id.* at 205. The court found that these requests were not permissible because they imposed an unreasonable burden on the agency. *Accord Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 26-28 (D.D.C. 2000) (noting that "[a] description of the requested documents is adequate if it enables a professional agency employee familiar with the subject area to locate the record with a reasonable amount of effort. *Further*, a request can be inadequate if it imposes an unreasonable burden") (internal citation omitted) (emphasis added); *Irons v. Schuyler*, 465 F.2d 608, 613 (D.C. Cir. 1972) (holding that although the request for "all unpublished manuscript decisions of the Patent Office" did "describe in general a type of record. . . the contours of the records thus described are so

broad in the context of the Patent Office files as not to come within a reasonable interpretation of 'identifiable records' as this statutory language is used in paragraph (a)(3).")

B. Categories One to Four of Plaintiff's Request Do Not Reasonably Describe The Records Sought.

Categories one to four of plaintiff's request for the documents contain aspects of each of the deficiencies described above. They do not reasonably describe the records to enable professional employees to locate responsive material with a reasonable amount of effort. Instead, they are both vague and unduly broad.

In category one, plaintiff seeks "all internal [CIA] documents pertaining to . . . the indexing and organizational structure of all CIA Systems of Records subject to FOIA, especially with respect to which Systems of Records are held by which CIA components (excluding the Privacy Act Systems of Records, detailed in 22 July 2005 Federal Register)." Exhibit 1 Nelson Decl. First, this request is imprecise because it is not clear from the description what documents plaintiff seeks. Nelson Decl., ¶ 16. Plaintiff's reference to "System of Records" subject to FOIA is confusing because the term "system of records" is a statutory term used in the Privacy Act, not in FOIA. The Privacy Act defines a "system of records" as "a group of any records under the control of the agency from which information is retrieved by name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). If CIA were to apply the Privacy Act meaning to "Systems of Records," there would be no records responsive to this item because plaintiff has expressly excluded all documents pertaining to the CIA's Privacy Act Systems of Records from the scope of the request.

If, on the other hand, category one of plaintiff's request is read broadly using the Privacy

Act definition without its limitation that information can be retrieved by the name of an individual, category one would be extremely broad and burdensome. It would appear to seek all documents related to the indexing and organizational structure of any group of documents which is not identified in the notice of CIA's Privacy Act System of Records but could be subject to a FOIA request. Such a request is extremely broad because every office of the CIA could reasonably be expected to have a collection or group of records which could be subject to a possible FOIA request. Nelson Decl., ¶¶ 17-19. It would, thus, in effect seek all documents pertaining to the organizational structure or indexing of almost any group of records on any subject in any office. Id. The only exceptions would be (1) operational records which are expressly excluded from FOIA searches by the CIA Information Act of 1984, 50 U.S.C. § 431, and (2) the systems of records identified in the CIA's Privacy Act notice, which plaintiff excluded from its request.

A search for documents responsive to such a request would be extremely burdensome because CIA's records are not centralized for security reasons. Id. ¶¶ 6, 19. As explained in the Declaration of Delores Nelson, Chief, Public Information Programs Division of the IMS, the CIA continually faces the risk that there may be a spy within its ranks. Id. ¶ 5. Prudence dictates the CIA take appropriate counterintelligence and security precautions to minimize the potential damage to national security that result from a spy in the CIA's midst. Id. One way to minimize such damage is to limit the amount of information to which any particular employee has access. Id. The CIA limits employee access to information by employing a "need-to-know" policy. Id. ¶ 6. This policy provides an employee access only to that information required to perform the employee's duties. Id. The CIA implements this policy through decentralizing and

compartmenting its records systems. Id.

Requiring the CIA to search for all documents pertaining to the organizational and indexing of any group of records on any subject in any office would, accordingly, impose an unreasonable burden on the agency. Id. ¶ 19. It would require every office in the CIA to review its records for any documents pertaining to the organizational structure and indexing of any group of records within its control. Courts have found that requests, which require an agency to search each of its offices, fail to reasonably describe the records sought. See Marks, 578 F.2d at 263 (request to search every field office of the FBI); Dale v. IRS, 238 F. Supp. 2d at 104-05 (request to search every office of the IRS).

The second category of documents sought by plaintiff presents similar problems. It seeks "all internal [CIA] documents pertaining to . . . all or part of the [CIA's] organizational structure (excluding the National Clandestine Service), especially organizational charts, outlines, or other graphical representations." Exhibit 1 to Nelson Decl. Like category one, this request is both vague and broad.³ It fails to identify precisely what records are being sought. While it

³ Under the CIA Act, the CIA is exempt from the provision of any law requiring publication or disclosure of the CIA's organization or functions, or requiring disclosure of the names or official titles of CIA personnel. 50 U.S.C. § 403g. Therefore, even if plaintiff restated its request with greater specificity, any information disclosing CIA's organization or functions is exempt from disclosure on the basis of the CIA Act and FOIA exemption (b)(3). See, e.g., Baker v. Central Intelligence Agency, 580 F.2d 664, 667-669 (D.C. Cir. 1978) (CIA's employment regulations and vacancy notices are exempt from disclosure under exemption 3 of the FOIA because they would reveal organization and function of CIA personnel); Rothschild v. CIA, No. 91-1314, 1992 WL 71393, *2 (D.D.C. Mar. 25, 1992) (information relating to organization and functions of CIA is exempt). The documents sought in categories one, three and four present this same problem because they seek identification of components of the CIA.

specifically mentions "charts, outlines, and other graphic representations,"⁴ it also seeks all documents "pertaining to" the organizational structure of "all or part of" the CIA. References to organizational structure might possibly be found in almost any type of document – memoranda, reports, letters, notes, drafts, emails – regardless of the subject matter or purpose of the document. Nelson Decl., ¶ 20. Moreover, the CIA is a large organization comprised of numerous offices and entities, each of which has its own organizational structure and organizational charts, and documents responsive to this request could, therefore, be located in any part of the CIA, other than the National Clandestine Service (which plaintiff explicitly excluded). Id. ¶¶ 20-21. Accordingly, a search for documents responsive to category two would be unduly burdensome because it is not limited to a specific type of document or specific office. Such "broad, sweeping requests lacking specificity are not permissible." Marks v. U.S. Department of Justice, 578 F.2d at 263.

The third category of documents sought by plaintiff's request is equally problematic. This category consists of "all internal [CIA] documents pertaining to . . . which components are tasked with FOIA requests by the CIA [IMS], especially with respect to which CIA offices are considered 'components' by IMS for tasking purposes." Exhibit 1 to Nelson Decl. While this request is framed as a request for documents, it is in reality more in the nature of two questions: (1) identify which CIA components are tasked by IMS with searches for FOIA requests; and (2) identify which CIA offices are considered "components" for tasking purposes. Requests for answers to questions disguised as FOIA requests are not permissible requests. DiViao v. Kelley,

⁴ Certain terms of the request are themselves vague as plaintiff seemingly refers to "outlines" as a form of "graphic representation," which is inconsistent with the term's customary usage.

571 F.2d at 542; Hudgins, 620 F. Supp. at 21.

But, even if category three were not objectionable on the above ground, it is still flawed. The decision as to which components to task with a FOIA request depends on the nature of the information sought. Nelson Decl., ¶ 8. Indeed, plaintiff acknowledged this very fact in its Complaint, ¶ 7. Thus, even if category three were read as a request for documents, rather than a request for an answer to a question, it is not clear what documents plaintiff seeks because the components tasked by each FOIA request would be different. If the request is read as all documents pertaining to which components have been tasked by IMS in any prior FOIA request, it would be extremely burdensome because it would require IMS, as well as each component which had ever been tasked with a FOIA search, to review its files on all prior FOIA requests from the date of the enactment of FOIA in 1966 for such documents. Nelson Decl., ¶¶ 23-24. Such a request would be extremely burdensome because the CIA receives an average of about 2000 to 3000 FOIA requests each year. See, e.g., www.foia.cia.gov/txt/annual_report.2007.pdf.

The fourth category of records encompasses "all internal [CIA] documents pertaining to . . . the search tools and indices employed by each CIA component from [category three] when processing FOIA requests." Exhibit 1 to Nelson Decl. This request raises several problems. First, it is linked to the components identified in any documents responsive in response to category three. Thus, because plaintiff's request for the IMS to identify components in category three is invalid for the reasons set forth above, category four is also necessarily deficient. Second, even if the request is divorced from category three and read as a request for search tools and indices employed by each component which could potentially be tasked with a FOIA request, it would, necessarily, include any and all offices of the CIA. Nelson Decl., ¶ 26. Moreover, the

search tools and indices used by a component in processing a FOIA request depend on the nature of the particular FOIA request and the configuration of that particular component's records. Id.

¶ 8. Accordingly, category four would require the CIA to conduct a sweeping search of all offices for any documents pertaining to any search tool or indices for any group of records which could potentially be subject to FOIA. Such a search would impose an undue burden on the agency. Id. ¶¶ 26-27.

In sum, categories one through four of plaintiff's request do not "reasonably describe" the records sought. They are both vague and so broad as to impose an unreasonable burden on the agency. Moreover, with respect to categories three and four, they are more in the nature of questions disguised as a request for documents. Accordingly, plaintiff fails to state a claim with respect to any of these categories of its request.

II. THE CIA CONDUCTED A REASONABLE SEARCH FOR DOCUMENTS RESPONSIVE TO CATEGORIES FIVE AND SIX.

The FOIA requires that an agency conduct a "reasonable" search for responsive records using methods which can be reasonably expected to produce the information requested by Plaintiff to the extent it exists. See 5 U.S.C. § 552(a)(3)(C); Rein v. U.S. Patent and Trademark Office, 553 F.3d 353, 359-60 (4th Cir. 2008). "In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed, but whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents." Ethyl v. U.S. E.P.A., 25 F.3d 1241, 1246 (4th Cir. 1994) (internal citation and quotations marks omitted). Accord Rein, 553 F.3d at 359; Carter, Fullerton

& Hayes v. F.T.C., No. 1:08cv182 (GBL), 2009 WL 604935, *4-6 (E.D. Va. Feb. 18, 2009).⁵ To meet this requirement, an agency is not required to search every office or record system, but need only search "the places most likely to contain responsive documents." Defenders of Wildlife v. U.S. Dept. of Interior, 314 F. Supp.2d 1, 10 (D.D.C. 2004). See Western Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 9 (D.D.C. 2000), aff'd, 22 Fed. Appx. 14 (D.C. Cir. 2003) (per curiam). Likewise, the sufficiency of a search is determined by the "appropriateness of the methods" used by the agency to carry out the search, "not by the fruits of the search." Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly, the failure of an agency "to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records." Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004).

Agency declarations are the appropriate vehicle to show that an agency's search was reasonable, and are afforded a presumption of good faith in this regard. See SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991); Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981) (per curiam). "[A]ffidavits describing agency search procedures are sufficient for purposes of summary judgment . . . if they are relatively detailed in their description of the files searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith." Citizens Comm'n, 45 F.3d at 1328 (quoting Zemansky v. Environmental Protection Agency, 767 F.2d 569, 571 (9th Cir. 1985). Accord Iturralde, 315 F.3d

⁵ This is consistent with the standards applied in the other Circuit courts. See, e.g., Citizens Commission on Human Rights v. Federal Drug Administration, 45 F.3d 1325, 1328 (9th Cir. 1995); Carney v. Department of Justice, 19 F.3d 807, 812 (2d Cir. 1994); Maynard v. Central Intelligence Agency, 986 F.2d 547, 559 (1st Cir. 1993); Miller v. Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985); Goland v. CIA, 607 F.2d 339,353 (D.C. Cir. 1979).

at 314.⁶ While declarations should be "sufficiently detailed," "[t]he standard, however, is not 'meticulous documentation [of] the details of an epic search.'" Texas Independent Producers Legal Action Ass'n v. IRS, 605 F. Supp. 538, 547 (D.D.C. 1984) (quoting Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982)). "Rather, the agency need only provide affidavits explaining in 'reasonable detail' the scope and method of the search, in the absence of countervailing evidence." Texas Independent Producers, 605 F. Supp. at 547 (quoting Perry, 684 F.2d at 127).

In this case, the CIA conducted a search that was reasonably calculated to uncover any documents responsive to categories five and six. These items seek documents related to the comments plaintiff submitted to IMS in response to a Notice of Proposed Rulemaking, 73 Fed. Reg. 20882 (April 17, 2008).⁷ Specifically, category five sought "all internal [CIA] documents pertaining to . . . discussions of the first and second recommendations made by JMP on 18 May 2008." Exhibit 1 to Nelson Decl. Category six seeks "all internal [CIA] documents pertaining to . . . any other records pertaining to the subject matter of the first and second JMP recommendation of 18 May 2008. Id.

In response those requests, the CIA conducted a thorough search of the IMS office, and found no responsive documents. Declaration of Joseph W. Lambert ("Lambert Decl.") (Exhibit B), ¶ 9. As Joseph W. Lambert, Director of the IMS, explained, the IMS is "the only place within

⁶ Accord Carney v. Department of Justice, 19 F.3d 807, 812 (2d Cir. 1994); Maynard v. Central Intelligence Agency, 986 F.2d 547, 556 n. 8 (1st Cir. 1993).

⁷ The proposed rules would amend the CIA's FOIA regulations to reflect the current organizational structure of its FOIA office and policies. Specifically, the proposed regulations would amend the FOIA regulations to specify the position and responsibilities of the agency's Chief FOIA officer, the FOIA Public Liaison and the FOIA Requester Service Center. It would also amend the regulations to clarify how a requester can appeal a denial of a waiver of fees.

the CIA in which any internal CIA records pertaining" to JMP's comments on the proposed rule "would be reasonably likely to have been generated following [his] receipt." Id. ¶ 7. As Director, Mr. Lambert initiated the proposed rule changes and was responsible for publication of the proposed amendment in the Federal Register. Id. The Federal Register notice also identified Mr. Lambert as the individual to whom public comments on the proposed amendments should be sent. Id. In that capacity, he received plaintiff's comments. Id. He has not forwarded the those comments to any other office outside IMS for consideration. Id. Moreover, as of September 25, 2008 (the date of plaintiff's FOIA request), "no internal CIA documents had been generated by IMS pertaining to the 18 May comments or the subject matter contained in the 18 May 2008 comments." Id.

Because this search was reasonably calculated to uncover any responsive documents, the search was adequate. Accordingly, defendant is entitled to judgment with respect to items 5 and 6 of plaintiff's FOIA request.

CONCLUSION

For the foregoing reasons, this Court should grant defendant's motion for summary judgment.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

DANA J. BOENTE
Acting United States Attorney

By: _____ /s/

Lauren A. Wetzler
Assistant United States Attorney
Attorney for Defendant
Justin W. Williams United States Attorney's Bldg
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3752
Fax: (703) 299-3983
Lauren.Wetzler@usdoj.gov

s/Marcia K. Sowles

ELIZABETH J. SHAPIRO
MARCIA K. SOWLES
Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, DC 20530
Tel: (202) 514-4960
Fax: (202) 514-8470
marcia.sowles@usdoj.gov

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES MADISON PROJECT,)	
)	
Plaintiff,)	Civil No. 08-1323
)	
VS.)	May 7, 2009
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	

REPORTER'S TRANSCRIPT
MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MARK S. ZAID, PC
BY: KELLY BRIAN MCCLANAHAN, ESQ.
MARK ZAID, ESQ.
BRADLEY MOSS, ESQ.
PUCKETT & FARAJ, PC
BY: NEAL A. PUCKETT, ESQ.

FOR THE DEFENDANT: OFFICE OF THE U.S. ATTORNEY
BY: LAUREN A. WETZLER, ESQ.
DEPARTMENT OF JUSTICE
BY: MARCIA K. SOWLES, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
U.S. District Court
401 Courthouse Square, 5th Floor
Alexandria, VA 22314
(703)501-1580

1 In this case, while there's -- the CIA has
2 made reference to the records system, it's not clear
3 exactly what the plaintiffs are seeking because they're
4 seeking all documents pertaining to this. And this would
5 be -- it's very vague and also very broad because it
6 basically would require all documents pertaining to any
7 group of records on any subject in any office because the
8 CIA has a decentralized records system for national
9 security reasons.

10 In fact, we think that the --

11 THE COURT: So, does the index -- does the
12 system of records mean that there is some template that
13 all officers follow concerning the management of records?

14 MS. SOWLES: No, Your Honor. That's -- I
15 mean, again, system of records is not a term that's
16 really used for FOIA. It's used in the Privacy Act area.
17 And under the Privacy Act, they define it as basically
18 any sort of group of records that you have. And that,
19 for privacy purposes, it's -- it's records that pertain
20 to a person that can be retrieved by a person's name.
21 But, it's not really clear what a system of records is.
22 A system of records --

23 THE COURT: I don't think -- I mean, I think
24 that the plaintiffs are not basing their request, at
25 least the way I read their brief, on the Privacy Act.

EXHIBIT K

~~Unclassified~~



1995 Edition -- Volume 38, Number 5

Studying and Teaching Intelligence

The importance of interchange *Earnest R. May*

A Policymaker's Perspective on Intelligence Analysis

Insightful interviews *Jack Davis*

British and American Policy on Intelligence Archives

Never-Never Land and Wonderland *Richard J. Aldrich*

Honoring Two World War II Heroes

Prestigious intelligence awards *R. James Woolsey, Maj. Gen. Doyle Larson, and Linda Zall*

Some Lessons in Intelligence

Enduring principles *R. V. Jones*

The Komsomolets Disaster

Burial at sea *George Montgomery*

Fifteen DCIs' First 100 Days

Taking stock *CIA History Staff*

Truman and Eisenhower: Launching the Process

Intelligence support *John Helgerson*

The Fall of Lima Site 85

The war in Laos *James C. Linder*

Origins of the Congress of Cultural Freedom, 1949-50

Cultural Cold War *Michael Warner*

Robert Fulton's Skyhook and Operation Coldfeet

A good pick-me-up *William M. Leary*

The Role of US Army Attachés Between the World Wars

Selection and training *Scott A. Koch*

Historical Intelligence Documents

CIA's early days

General de Gaulle in Action

status in intelligence--Unclassified 1995 Edition



1960 summit conference *Lt. Gen. Vernon A. Walters*

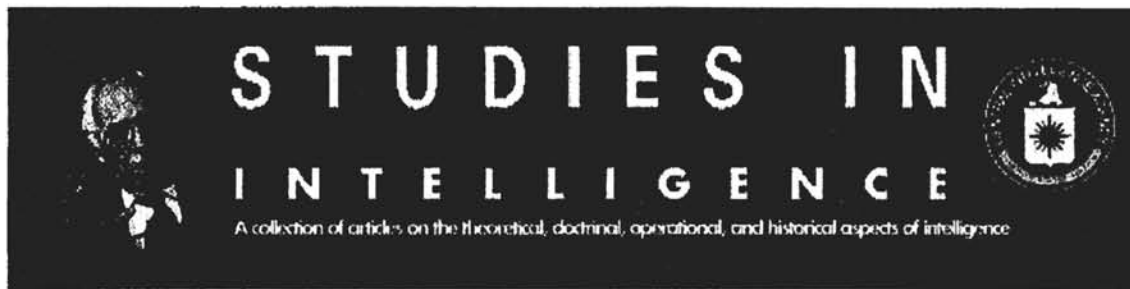
Of Moles and Molehunters

Spy stories *Cleveland C. Cram*

[Studies Page](#) | [CSI Homepage](#)

~~Unclassified~~

~~Unclassified~~



Volume 39

Number 5, 1996

INTELLIGENCE TODAY AND TOMORROW

A Roundtable Discussion

The Brown Commission and the Future of Intelligence

A Colloquium

The Intelligence Community: Is It Broken? How To Fix It? John H. Hedley

A Singular Opportunity

Gaining Access to CIA's Records Evan Thomas

The Need for Integrity

Thoughts Provoked by "The Very Best Men" Michael Thompson

The Challenge of Managing Uncertainty

Paul Wolfowitz on Intelligence-Policy Relations Jack Davis

Another System of Oversight

Intelligence and the Rise of Judicial Intervention Frederic F. Manget

A Different Kind of Threat

Some Thoughts on Irregular Warfare Jeffrey B. White

Declassification's Great Leap Forward

CORONA and the Intelligence Community Kevin C. Ruffner

The Intelligence of Nations

Adam Smith Examines the Intelligence Economy Todd Brethauer

HISTORICAL PERSPECTIVES

Coping With Iran-Contra

Personal Reflections on Bill Casey's Last Month at CIA James McCullough

Commentary

Commentary David Gries

Revisiting Vietnam

Thoughts Engendered by Robert McNamara's "In Retrospect" Harold P. Ford

Salvage and Liquidation

The Creation of the Central Intelligence Group Michael Warner

Duping the Soviets

The Farewell Dossier Gus W. Weiss

COVER OF PRINTED PUBLICATION

William J. Casey Courtesy of Dennis Brack/Black Star

[Studies Page](#) | [CSI Homepage](#)

~~Unclassified~~

EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY :
COUNSELORS, : Docket No. CA 11-443
 :
 Plaintiff, : Washington, D.C.
 vs. : Friday, December 16, 2011
 : 10:10 a.m.
CENTRAL INTELLIGENCE :
AGENCY, :
 :
 Defendant. :
-----x

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE BERYL A. HOWELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: KELLY BRIAN MCCLANAHAN, Esquire
National Security Counselors
1200 S. Courthouse Road
Suite 124
Arlington, VA 22204

For the Defendant: RYAN BRADLEY PARKER, Esquire
U.S. Department of Justice
Civil Division
20 Massachusetts Avenue, NW
Suite 400
Washington, DC 20001

Court Reporter: CRYSTAL M. PILGRIM, RPR
Official Court Reporter
United States District Court
District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

Proceedings recorded by machine shorthand, transcript produced
by computer-aided transcription.

1 and what the issues are with that proposal, if you could
2 address that in your papers so that I understand that process,
3 it would be helpful to the Court as well. As you're
4 considering the proposal in any event.

5 MR. PARKER: Right. So Your Honor, just so that I'm
6 clear on January 13th we will file with the Court both an
7 affidavit and a supplemental memoranda explaining first the
8 process that takes place when someone, a hypothetical requestor
9 requests information that is only unclassified. And --

10 THE COURT: Or but in addition to that, when a
11 request that may encompass both classified and unclassified
12 information how does the CIA handle the portion of the requests
13 that it deals with unclassified information. And why it is so
14 necessary to take the portion of the request that deals with
15 unclassified information and stick it on a classified computer
16 system with all of the limitations and production formats that
17 entails.

18 MR. PARKER: Okay, Your Honor. I don't want to
19 belabor this.

20 THE COURT: And how that fulfills the agency's
21 obligations to maintain its records in forms or formats that
22 are reproducible for purposes of this section, and I read that
23 agency obligation in conjunction with its obligation to produce
24 documents to the extent that the documents are readily
25 reproducible in the format requested by requestors and

1 particularly with requests for voluminous records, you know,
2 getting them in paper format rather than electronic format is,
3 can be problematic also for further dissemination of the
4 records.

5 MR. PARKER: Thank you, Your Honor. I think I
6 understand. I don't want to belabor this point anymore but I
7 do want to, because we've talked about these things for some
8 time now, make sure that I understand.

9 I believe there are two points you would like addressed
10 both in the memo and in the declaration. The first is how the
11 CIA handles request for unclassified information or requests
12 that include both classified and unclassified information. And
13 how the CIA's system conforms with the obligation under FOIA to
14 keep records in a format that in which they could be readily
15 producible.

16 And then the second is the process the CIA goes to
17 upload documents to their FOIA reading room.

18 Are those the two points, Your Honor?

19 THE COURT: Yes.

20 MR. PARKER: We will have that for the Court on the
21 13th.

22 THE COURT: Thank you very much.

23 Is there anything further?

24 MR. MCCLANAHAN: May I clarify one small point, Your
25 Honor?