UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-00224 (TSC)

CENTRAL INTELLIGENCE AGENCY

Defendant.

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiff Grant F. Smith respectfully opposes Defendant Central Intelligence Agency's Motion for Summary Judgment (Doc 17). In support of this opposition, Plaintiff submits the following: its Memorandum in Support of Plaintiff's Opposition to Motion for Summary Judgment, Plaintiff's Opposition to Defendant's Statement of Material Facts as to which there is no Genuine Dispute, a Proposed Order Denying Motion for Summary Judgment, a Motion for Leave to File an Amended Complaint, and a Proposed Order Granting Leave to file an Amended Complaint.

Dated January 28, 2016

Respectfully submitted,

Grant F. Smith, Pro Se
4101 Davis PL NW #2
Washington, DC 20007
(202) 640-3709

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-00224 (TSC)

CENTRAL INTELLIGENCE AGENCY

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. Introduction: The Public Interest

The public interest in knowing what the CIA has long claimed to know about the Nuclear Materials and Equipment Corporation (NUMEC) and illegal diversion of US weapons-grade uranium to Israel is overwhelming. The CIA's role in generating this interest is clear. As referenced in the complaint [Dkt #1] it was the CIA director who first secretly alerted top US government officials to the possibility of diversion in 1968. Two other highly placed CIA officials, CIA Tel Aviv Station Chief John Hadden and Deputy Director for Science and Technology Carl Duckett, later went public with their convictions and concerns that a diversion took place. [Dkt #1] However, a massive $500 million cleanup now is proceeding on the basis that parties other than the smugglers or Israel are to blame for the presence of a shoddy smuggling front that polluted the environs of Apollo, PA. Absent more information, unsuspecting US taxpayers will continue to be assessed the full cost of environmental and health damages. The CIA, which has fought hard against all Freedom of Information Act (FOIA) 5 U.S.C. § 552 lawsuits for NUMEC files since 1978, wishes to continue covering up operations information that should be in the public domain. Critical CIA information, by the CIA's own admission in its September, 2015 release of declassified secret files in response to the Plaintiff's lawsuit, [Dkt #14-1] was even withheld from FBI investigators looking into Atomic Energy Act and other violations. This unnecessary secrecy, ongoing since 1968, stymied two separate FBI investigations into Atomic Energy Act 42 U.S.C. § 2011 et seq. and other violations. (See Grant F. Smith "CIA Cover-up Thwarted FBI's Nuclear Diversion Investigations: Evidence that missing uranium went to Israel withheld since 1968" *Antiwar.com*, September 7, 2015). It is time for the half-century old CIA

veil of unwarranted secrecy justified through unfounded assertions of protecting US national security to end.

There is little to nothing upon which the Parties agree. The CIA believes it has met all of its statutory obligations, having never searched its operational files, declaring that a very clearly written law, 50 U.S.C. §3141 Operational files of the Central Intelligence Agency, is inapplicable, and applying overly broad interpretations of FOIA exemptions with near zero segregation to released and unreleased non-operational file material is sufficient. The Plaintiff believes multiple subsections of 50 U.S.C. §3141 clearly apply, that the CIA must search its operations files and related databases where the majority of information is stored, and that a bona fide response will not commence until CIA searches the identified "thousands" of documents gathered up by the Department of Justice during its 1976-1980 investigation, which the Plaintiff alleges was performed to find "any impropriety, or violation of law...in the conduct of an intelligence activity" of the CIA. The Plaintiff also believes two other investigations by enumerated parties into "improprieties in the conduct of intelligence activities" at CIA also trigger search and release under 50 U.S.C. §3141 (c).

The Defendant has provided no admissible evidence that it has properly conducted two required 50 U.S.C. §3141 (g) "decennial reviews" despite immense public interest in the NUMEC affair and the historical and current value of the operations files.

II. Argument

a. Summary Judgment Standard

Summary judgment short-circuits the fact-finding function of the federal courts. It is only "granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. In determining whether a genuine issue of fact exists, the court must view all facts in the light most favorable to the non-moving party." *Judicial Watch, Inc. v. Consumer Financial Protection Bureau*, 985 F. Supp. 2d 1, 6 (D.D.C. 2013) (citations omitted). This is equally true here, as "[u]nder FOIA, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester." Id. (citations omitted). Summary judgment is premature in this case, because "only after an agency proves that is has fully discharged its FOIA obligations is summary judgment appropriate." Id. (citations omitted).

Indeed, "[t]he withholding agency bears the burden of establishing that the withheld information qualifies for a statutory exemption from disclosure." *Trulock v. Dep't of Justice*, 257 F. Supp. 2d 48, 50 (D.C. Cir. 2003) (citation omitted). While "[t]hat burden may be satisfied 4 Case 1:14-cv-00970-RBW Document 13 Filed 09/11/14 Page 10 of 29 through submission of an agency declaration describing the material withheld," that declaration "must be relatively detailed and non-conclusory." Trulock, 257 F. Supp. 2d at 50; Judicial Watch, 985 F. Supp. 2d at 6 (citation and quotation marks omitted).

b. Nondisclosure of Government Documents is Disfavored Under FOIA

"The Supreme Court has explained that the FOIA is a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Shapiro v. Dep't of Justice*, 969 F. Supp. 2d 18, 25 (D.D.C. 2013). The "basic policy" and "dominant objective" of FOIA is to further "disclosure, not secrecy." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). While the FOIA contains a limited number of statutory exemptions, these exemptions "have been consistently given a narrow compass." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation and quotation marks omitted). As a result, "all FOIA exemptions, must be construed as narrowly as consistent with efficient Government operation." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citation and quotation marks omitted). Accordingly, "[u]nder FOIA, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester; as such, only after an agency proves that it has fully discharged its FOIA obligations is summary judgment appropriate." *Judicial Watch*, 985 F. Supp. 2d at 6 (citations omitted).

c. CIA does not Proactively Review Under 50 U.S.C. §3141

The CIA Information Act of 1984, 50 U.S.C. §3141 demands search and release as applied to this FOIA request. However, as recent legal research has substantiated, "Today the CIA refuses to abide by Congress's intent. It routinely refuses to search its operational files—particularly the ones which have been subject to an investigation and which Congress intended to be public…CIA's performance under the 1984 Act today falls short of Congress'

original expectations…courts have struggled with the Act's interpretation in the few suits involving this little-invoked provision."[1] (See Hannah H. Bergman, "The CIA's Public Operational Files: Accessing files exempt from the CIA Information Act of 1984 because of investigations into illegal or improper activity." American University, Washington College of Law.) The findings in this study point to the deficiencies that the Plaintiff is now experiencing in the CIA's handling of his request.

c. The CIA's Search for Records was Inadequate Under 50 U.S.C. §3141

The adequacy of the CIA's search for responsive documents is an overarching issue. CIA's failure to search for "operational files" renders the search out of compliance with 50 U.S.C. § 3141(c) and requires a new search, preferably followed by *in camera* review of responsive documents.

Armed with a Vaughn index and list of declarations about how the CIA is supposed to process Freedom of Information Act requests in theory, which contains major errors and is long on generalities and short on specifics most applicable to this case, the CIA cannot bear its burden. Such a conclusory affidavit "that generally asserts adherence to the reasonableness standard . . . is insufficient to carry the CIA's burden on summary judgment to prove that no substantial and material facts are in dispute and that it is entitled to judgment as a matter of law." *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007). (internal quotations, alterations, and citations omitted) The description of a CIA search is inadequate

[1]

where the affidavit fails to "explain in reasonable detail the scope and method of the search conducted by the agency sufficient to demonstrate compliance with the obligations imposed by the FOIA." Id. The documents requested by the Plaintiff are releasable under FOIA when the 1984 CIA Information Act is properly applied. All of the most recent general open government precedents favor their immediate release.

II. The CIA was Investigated by Three Parties Enumerated in 50 U.S.C. §3141(c)(3) for "Improprieties in the Conduct Of Intelligence Activities"

Under 50 U.S.C. § 3141, the Director of the CIA "may exempt operational files of the Central Intelligence Agency from" FOIA. 50 U.S.C. § 3141(a). "Operational files are defined in turn to include certain files of the Directorate of Operations, the Directorate for Science and Technology, and the Office of Personnel Security that contain sensitive information about CIA methods." *ACLU v. Dep't of Def.*, 351 F. Supp. 2d 265, 270 (S.D.N.Y. 2005) (citing 50 U.S.C. § 431, the predecessor to 50 U.S.C. § 3141). These include files "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources . . . except that files which are the sole repository of disseminated intelligence are not operational files." Id.

However, the CIA Information Act creates an exception to this exemption. Such operational files remain subject to the FOIA in three situations: (1) searches by individuals for information about themselves, (2) searches relating to special activities, or (3) searches relating to investigations of improper or illegal conduct. The last exception is at issue here, and provides that:

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

. . .

(3) the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

The Central Intelligence Agency, was not investigated by one of the parties enumerated in 50 U.S.C. § 3141 (c)(3) for "impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity. It was investigated by three enumerated parties.

The Central Intelligence Agency was investigated by the U.S. Department of Justice, congressional intelligence committees through the General Accounting Office investigation on behalf of the entire Congress, and under a Presidential Directive to his National Security Advisor to determine whether CIA engaged in "any impropriety, or violation of law...in the conduct of an intelligence activity."

The Department of Justice Investigation was chartered in an April 22, 1976 secret memorandum for the President. [Doc 16, Exhibit 16] As examined later, that investigation later led directly to the CIA, which officials of the National Security Council, many individual members of congress and the GAO were also investigating on behalf of Congress

for impropriety in 1977-1978. The Department of Justice intensified its investigation into the CIA during that period, both requesting and receiving "thousands" of CIA files, including operations files, and detailing why the CIA thought—and some of its high officials publicly asserted—US weapons-grade uranium stolen from an Atomic Energy Agency contractor, rather than being turned into nuclear fuel for the U.S. Navy and other bona fide clients, instead ended up in Israel's clandestine nuclear weapons program. An investigation into CIA improprieties by any party designated under 50 U.S.C. § 3141(c)(3), including in this case the U.S. Department of Justice, makes those materials searchable and releasable. It does not matter if the Department of Justice ever used the CIA files for a final report, and indeed, such a search and release is greatly facilitated in that the CIA already had compiled and turned over to the Department of Justice the very materials sought via this FOIA and under 50 U.S.C. § 3141 (c)(3), since it is quite possible that the Department of Justice still retains all of the files turned over by the CIA.

The gathering of CIA operational files as an aid to FOIA release was clarified by Judge Alvin K. Hellerstein in *ACLU v. DOD*, 827 F. Supp. 2d 217; 2011 U.S. Dist. LEXIS 115171, in a circumstance in which the Office of Inspector General collected videotapes and information about so-called "harsh interrogations" as part of an investigation of the CIA for improprieties in the conduct of intelligence: "The CIA had represented that, in the course of the investigation, the OIG already had searched for and received documents from operational files and thereafter had maintained those documents in the OIG's investigative files. Id. I concluded that there would be 'no additional material burden in searching and reviewing the documents already [**13] in the OIG's files that are also responsive to

plaintiffs' FOIA requests.' Id. Indeed, the burden of responding to plaintiffs' FOIA requests would be 'much reduced, for the search ha[d] already been made.' Id. at 274. As far as the scope of the investigation exception was concerned, I relied, once again, on the plain language and legislative history of the CIA Information Act. Id. at 276-78. My review of those materials made clear that the CIA was required [*222] to 'search and review its information produced [**14] or gathered 'concerning . . . the specific subject matter" of the OIG's investigations 'for public release, or specific exemption, under FOIA.' Id. at 276. I noted, further, that the 'documents in question need not actually have been reviewed and relied upon by the OIG staff, and the CIA may not delay compliance until such time, if ever, an investigation is closed.; Id. at 276-77. I therefore ordered the CIA to proceed with its search and review in response to plaintiffs' FOIA requests and in accordance with my Opinion and Order of September 15, 2004. Id. at 278."

The CIA should possess logs of the classified operational files it turned over to the Department of Justice three decades ago. As mentioned, the Department of Justice may also possess the documents. The CIA still has not yet conducted any search for releasable Directorate of Operations files or other files swept up in the Department of Justice investigation. Not during the FOIA administrative process which began in 2010, not after the ISCAP overruled CIA redactions as overly zealous in 2014, and not upon the filing of this lawsuit in 2015. This behavior is typical. Indeed, one study found, "The Agency is not making initial searches of operational files which have been subject to an investigation, as the 1984 Act requires." (See Bergman, page 19)

In the Wilson affidavit (Dkt 17-2, page 7) the defendant claims, "Databases

containing DO operational files are exempt from FOIA and are not subject to search and review." Wilson elaborates that "Such an exemption was not identified in this case, and NCS did not conduct a search of the Agency's operational files in response to this request." (Dkt 17-2, page 14) The Defendant claims evidence documents submitted by the Plaintiff (Dkt 14-1) trigger the applicable exemptions listed under the 50 U.S.C. §3141, "because Plaintiff does not point to an investigation by any of the enumerated entities for any impropriety or violation in the conduct of an intelligence activity."

The Plaintiff does point to enumerated parties. Three of them, to be precise. But were their investigations "for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity"? The inclusion of the word "impropriety" alongside "violation of law" suggests that Congress intended the terms to apply broadly; the misconduct need not amount to illegality. The CIA's own release of records in response to this action reveals that there was indeed such misconduct. The agency, by its own admission, refused to brief FBI investigators about what it knew. "According to a May 11, 1977 report by Shackley, the "CIA has not furnished to the FBI sensitive agent reporting…since the decision was made by Directors Helms, Colby and Bush that this information would not further the investigation of NUMEC…" (Dkt 14-1). Such reticence often lands average Americans in jail as "accessories after the fact." Enumerated entities, as further documented here, were all trying to discover what role the CIA may have had in the diversion, who it notified upon discovering it, and if it was acting as an "accessory after the fact" by improperly engaging in a cover-up.

The Defendant claims that a Department of Justice investigation cited in an Attorney

General memorandum (Dkt 14-1) "broadly focuses on the entire Government, stating that the investigation 'should consider whether any dismissal or other disciplinary proceedings may be appropriate with response to any persons presently employed as federal officials who may have participated in or concealed any offense." The Defendant dismisses this as a trigger under 50 U.S.C. §3141 by claiming "there is nothing in the [22 April 1976 Department of Justice] memorandum to suggest that it was 'an investigation…for any impropriety, or violation of the law…in the conduct of an intelligence activity." The Defendant therefore asserts it "did not search its operational files in connection with the plaintiff's request." [Doc 17-2, P21]

So what is intelligence as it pertains to an investigation? Under one of the CIA's own publications on its website page, "Intelligence as a Science," citing Martin T Bimford "A Definition of Intelligence" in *Studies in Intelligence*, Vol. 2, No. 2 (Spring 1958), page 76, "Intelligence is the official, secret collection and processing of information on foreign countries to aid in formulating and implementing foreign policy, and the conduct of covert activities abroad to facilitate the implementation of foreign policy."

If, as many both inside and outside government at the time (and today) suspected, a group of CIA operatives facilitated the illegal diversion of weapons-grade uranium from a US contractor to Israel (one of four theories specifically investigated by the GAO in the 1978 report *Nuclear Diversion in the US?*, and numerous individual members of Congress, including intelligence oversight committee members investigated), that alleged activity certainly would have qualified as both an "intelligence activity" and an "impropriety." In addition to simultaneous individual inquiries by members of Congress, National Security

Council officials (as discussed later) and the GAO into that possibility, the Plaintiff alleges there is evidence that the US Department of Justice also found investigating CIA improprieties to be within the scope of its investigation as it progressed. There is nothing in 50 U.S.C. §3141 requiring, as the Defendant apparently assumes, that the target of an investigation and subject matter must or even can be clearly and cleanly defined in the earliest possible Justice Department memo or other law enforcement communication chartering an investigation. That fact that in this case it did indeed becomes apparent through an examination of the corpus of relevant documents, statements of relevant officials, and context.

The Defendant implies that since the investigation was broadly construed at its onset, that CIA "impropriety or violation of law…in the conduct of an intelligence activity" never became the subject of the investigation, and that CIA itself was never a target of investigation. The defendant goes on to state that "Because the CIA is in the business of collecting information, the Department of Justice routinely reviews documents in the CIA's possession that may be relevant in a wide variety of criminal investigations." [Doc 17-2, p 24] However, the CIA also engages in a great many covert operations, some of which have been later determined to be illegal. While it may be true that sometimes the Department of Justice reviews CIA documents in the conduct of criminal investigations targeting other subjects of interest, it does not rule out that the DOJ was investigating CIA for improprieties in this particular instance. The Defendant states that "it is clear that CIA had an interest in the alleged NUMEC diversion." [Doc 17-2, p 24] The defendant references a heavily-redacted 1968 CIA Director warning to the Attorney General requesting an investigation.

This is some kind of exoneration of CIA conduct, as the Defendant states, "Accordingly, the 25 April 1979 memorandum's references to the fact that the Department of Justice reviewed CIA documents is not unusual and does not establish that there was 'and investigation…for any impropriety, or violation of law…in the conduct of an intelligence activity." [Doc 17-2, p 24] However, alone it does not rule out such an investigation either. Indeed, when other facts are considered, it is obvious that the CIA was being investigated by the Department of Justice for improprieties. Ample evidence indicates that not only did the Department of Justice investigate the CIA for improprieties, but that it also uncovered information so troubling it felt only Congress was positioned deal with it, ostensibly in its intelligence oversight role.

Under the Defendant's admirably optimistic world outlook, subjects and targets of investigation are always notified in advance that they are, in fact, subjects and targets. In the real world, however, such a noble "Marquess of Queensberry" declarations of intent at the onset of an investigation are not always made in criminal and most especially counterespionage investigations. Given the CIA's documented history responding to such outside investigations then and now, it would, in fact, have been most inadvisable.

For example, when the Warren Commission attempted to obtain relevant CIA information during their investigation of the JFK assassination, CIA historian David Robarge claims "[DCI] McCone withheld information to keep the Warren Commission focused on what the agency believed to be the 'best truth'" and withheld important

information.[2] Kelly McLaughlin, "Former CIA director was part of a 'benign cover-up' to withhold information from investigators about JFK's assassination." *Daily Mail*, October 10, 2015.

The CIA's illegal mind control program MK ULTRA involved LSD experiments on unsuspecting American human subjects. Investigators in 1975 from the Church Committee and Gerald Ford's own commission found the CIA had proactively destroyed documents under order of CIA Director Richard Helms. MK Ultra is one of the CIA abuses that formed the basis for passage of the 1984 CIA Information Act. Suspicion that it might be investigated seems to lead to the destruction of documents and other materials at the CIA, despite all of the vaunted claims of process and procedure.

A more recent is the case that should cast a shadow of "presumed bad faith" over all attempts to obtain information from the CIA under 50 U.S.C. §3141, including this one, is the so-called case of the CIA's "torture tapes." As a three-act play, in Act I FOIA filers insisted in a lawsuit that because an OIG investigation triggered the criteria of 50 U.S.C. §3141, the agency had to release 92 videotapes of detained suspects in CIA facilities undergoing harsh interrogation that had been turned over to OIG. Act II, Judge Alvin Hellerstein found for the plaintiff, and ordered the CIA review and release the tapes. In Act III, despite the court order, the CIA destroyed all of the videotapes. Because of this indisputable history, the Plaintiff presumes bad faith in his FOIA request, until proven otherwise.

[2] http://www.dailymail.co.uk/news/article-3267845/Former-CIA-director-John-McCone-benign-cover-withhold-information-investigators-JFK-s-assassination.html

Investigating the CIA for impropriety has and continues to be a difficult and challenging business. Deception tactics, in which the CIA itself is heavily invested, but over which it does not currently hold a monopoly, are often a tool deployed against such hardened targets. The U.S. Supreme Court has repeatedly acknowledged that "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). "Nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available." *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973). Investigators lawfully use all kinds of subterfuge, trickery, and ruses to uncover facts, including infiltration and pretending to be "part of the team" of the target organization.[3] (see Devallis Rutledge "The lawful use of deception" *Police Magazine*, January 1, 2007) The CIA has an observable tendency not to cooperate with investigators in situations it believes will ultimately harm its reputation, most recently in the case of the detainee torture video tapes which it internally judged, quoting officials directly, were "bad news." Turning back to the "Torture Tapes," internal conversations among officials at CIA about the FOIA matter assessed that, even after a court ordered CIA to release the tapes, "heat from destroying [the video tapes] is nothing compared to what it would be if the tapes ever got into public domain... they would make us look terrible; it would be 'devastating' to us, a sentiment with which '[a]ll in the room agreed.'" The CIA then destroyed video tapes it had been ordered by a court to release.

[3] Devallis Rutledge "The lawful use of deception" Police Magazine, January 1, 2007 http://www.policemag.com/channel/patrol/articles/2007/01/point-of-law.aspx

Hellerstein in *ACLU v. DOD*, 827 F. Supp. 2d 217; 2011 U.S. Dist. LEXIS 115171 [**28]

In 1976-1980, the Justice Department would not likely have told the CIA at the onset of the Attorney General order that CIA was also under investigation for impropriety or detailed this fact in widely circulated memos about its broader investigation. The Department of Justice would even likely have assured the CIA that it was ***not*** the investigation's target, even as it asked in a friendly manner, "let's get to the bottom of this" ordering the CIA to turn over thousands of operations files about NUMEC. But this did not change the fact that the CIA was being investigated for an "impropriety or violation of law…in the conduct of an intelligence activity" 50 U.S.C. §3141 is entirely silent on the tactics investigators may use during such investigations. But the outcome of cases such as *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007) reveal that investigations into the CIA by enumerated parties need not have clearly or at the onset named the CIA as a target for 50 U.S.C. §3141(c) to apply. Also, because of the nature of the CIA, it is useful to look at the "bigger picture" to understand why it was under investigation.

Based on the evidence, it is clear that the Department of Justice was investigating the CIA for an "impropriety or violation of law…in the conduct of an intelligence activity." Or, put another way, it is clear that DOJ was not alone investigating the subject among concurrent GAO investigators, individual members of Congress, including from the Intelligence oversight committees, and members of the President's cabinet during the relevant time period. The Department of Justice was ***not*** the only entity ***not*** investigating the CIA for an "impropriety or violation of law…in the conduct of an intelligence activity." It was ***also*** investigating alongside and in the case of the President, in league with all of the

others.

Evidence supporting this fact is available at the very top in the Executive Branch, within the president's cabinet, or more specifically, the National Security Council. The National Security Council is the principal forum used by the President to consider foreign policy and national security matters. It has advised and assisted the president on national security matters and foreign policy since its founding under the Truman administration by the National Security Act of 1947. It is also the president's body for coordinating policies among various government agencies.

A National Security Council official, such as Zbigneiw Brzezinski who served as counselor to President Lyndon B. Johnson from 1966 to 1968 and as National Security Advisor to President Jimmy Carter from 1977 to 1981, would have had all the historical perspective, security clearances and access to secret information he needed in order to know whether the United States had for some reason ever officially sanctioned an extremely sloppy secret transfer of government-owned U.S. weapons-grade uranium through the shoddy, undercapitalized and polluting AEC contractor NUMEC in Apollo, Pennsylvania. Reporting on August 2, 1977, one year after the commencement of the Department of Justice investigation, Brezinski confidentially wrote President Jimmy Carter that "So far as we know however, (and we have made serious effort to discover it) there is nothing to indicate active CIA participation in the alleged theft…" (Dkt 1, Exhibit 15) Although that statement somewhat does exonerate the CIA of misconduct, it clearly reveals the presence of an investigation. (50 U.S.C. §3141(c)(3) does not require that investigations find guilt or innocence, or even be concluded or that a final report was issued, merely that an

investigation into improprieties was initiated.) It is clear, from this National Security Council official's statement that his boss, the President, wanted to know what the CIA's role in an illegal diversion may have been. The President's request to make a serious effort to discover it, was a "directive" under 50 U.S.C. §3141 (c)(3). The "serious effort" was an investigation. "Participation in the alleged theft" was certainly the "impropriety , or violation of law...in the conduct of an intelligence activity" being investigated. The President is enumerated party #2 under the plaintiff's reference to 50 U.S.C. §3141 (c)(3). There is also no doubt that this Presidential directive shaped subsequent Department of Justice investigative efforts, as is clear from the record.

What available means would a president's cabinet have had at its disposal to undertake a "serious effort to discover…active CIA participation in the alleged theft…?" Theft of weapons-grade uranium in this case is a criminal matter possibly involving rogue CIA case officer collusion or espionage by high officials against the U.S in league with Israel. The White House would have sought out a federal executive department responsible for the enforcement of the law and the administrative of Justice in the United States. He, or his staff, would have tapped an office employing qualified law enforcement officials capable of gathering evidence, evaluating probable cause, precipitating a grand jury hearing and securing indictments and prosecution, or referring the matter on to other agencies. In all likelihood, the president's national security staff would have turned the matter over to the Attorney General, who is nominated by the President, is confirmed by the Senate and sits in the Cabinet alongside members of the National Security Council. That federal executive department is the United States Department of Justice.

Yet, in the case of NUMEC where, interpreting Zbigniew Brzenski's statement, CIA involvement was suspected, the Department of Justice division then selected to investigate the CIA in particular would not have been, as was not, the FBI. There has been a very public and counterproductive turf war between the FBI and the CIA since the 1940s during which FBI Director J. Edgar Hoover battled to be placed in charge of important U.S. intelligence functions instead of the nascent CIA. (see Timothy Weiner, *Legacy of Ashes: The History of the CIA [New York, Anchor, 2008])* Given its stunted and derailed initial investigation of NUMEC in the 1960s, and overall responsibility for investigating entities and hundreds of related individuals other than the CIA possibly involved in the affair, such as NUMEC company executives and employees of the Atomic Energy Commission, another division of the Department of Justice with experience in prosecuting espionage and other sensitive matters would have been put in charge. The two most appropriate Department of Justice divisions in existence would have been the Internal Security Section and the Criminal Division. As it happens, both were actively investigating CIA for possible impropriety, according to evidentiary record.

The Internal Security Section, according to the Department of Justice, "has jurisdiction over cases which involve false statements concerning relationships with foreign governments or membership in organizations advocating the violent overthrow of the government, made to agencies and departments of the United States, in violation of 18 U.S.C. § 1001 and similar statutes."[4] (see *Synopses of Key Internal Security Provisions. Offices of the United States Attorneys*, Criminal Resource Manual 2001-2099 2059) Since the Department of

[4]

Justice was investigating whether the CIA illegally diverted, or assisted in the diversion, or covered it up, it would have involved the Internal Security Section to investigate the CIA. And it did.

On April 25, 1979 Attorney General Griffen Bell received an update on the NUMEC investigation from Frederick D. Baron, his special assistant who reported the Internal Security Section progress investigating CIA. Baron stated "The internal security section has now completed a detailed review of thousands of CIA documents and is preparing a report.[5] On the basis of this document, some further investigation by the FBI will be necessary. Termination of the investigation will depend in large measure on the results of the Bureau's investigation. Jack Keeney believes that upon completion of the review, we should give serious consideration to making the materials available to an appropriate committee of Congress." [Doc 1, Exhibit 14]

At the time, the FBI was concentrating on investigating other relevant subjects. Former plant officials, employees and AEC regulatory staff. It is therefore illuminating that Jack Keeney recommended an appropriate course of action—in addition to more targeted FBI investigations informed by review of CIA files—that would have been an outcome of investigating impropriety at the CIA—that the Congress would also have to get involved, because—once again—the CIA was suspected of having engaged in improper activities.

John Christopher "Jack" Keeney, when he retired at age 88, was the Department of Justice's oldest employee. Starting in 1951, Keeney spent decades in the Criminal Division of

[5] This report is the one the Department of Justice told the Plaintiff in the course of a 2011 FOIA that it could locate, though it never looked in the right places, or completed the process.

the Justice Department. On numerous occasions he also served as Acting Assistant Attorney General. The highly experience Keeney did not refer the CIA investigation to a United States Attorney to expand the investigation, file criminal charges, or convene a grand jury. Instead, Keeney recommended "that upon completion of the review, we should give serious consideration to making the materials available to an appropriate committee of Congress." Given the environment, that committee probably would have been an intelligence oversight committee. It is hard to image what other committee it could have been, after such an in-depth review of CIA operational files. It is also relevant that the Keeney memo was copied to Department of Justice Attorney John H. Jack Davitt who was responsible for reviewing all major espionage cases from 1951 to 1980.

According to an obituary, "Davitt joined the Justice Department in 1951 and participated in the preparation of every major espionage prosecution initiated by the department. He held a series of posts in the internal security division, including acting deputy assistant attorney general, deputy chief and chief of the criminal section, and head of the espionage unit. In a 1992 article in the *St. Petersburg Times*, "Mr. Davitt noted that the Cold War did not bring an end to spying and that there has been an increase of industrial espionage against the United States by its allies. He said in the article that our allies are using spy methods 'every bit as sophisticated as those of the KGB in order to gain high-tech secrets.'" (See "Espionage Attorney John Davitt Dies," *The Washington Post*, February 17, 2005) The CIA's operations files about Israel boosting weapons-grade uranium and secrets secured at an AEC contractor, in league with Israel's top spies, certainly would have fit within Davitt's key concerns.

It is therefore logical that Davitt was in the loop when evidence was uncovered pointing to a rogue CIA operation colluding with foreign agents and NUMEC to supply weapons- grade uranium to Israel. The CIA cover-up that occurred. He would have logically been notified of recommendations that the matter was being referred to congressional oversight committees.

Considering the corpus of the evidence available to outsiders in context, from the Attorney General memo charting the investigation, to the statements of a member of the National Security Council, to the Keeney memo, all point to a Department of Justice investigation of "impropriety" in the conduct of intelligence at CIA is illuminating. But it is also necessary to consider the CIA's own release of information in September of 2015 to the Plaintiff [Dkt 16, Exhibit 17] in response to this lawsuit and ask, "is it possible that, alone, among so many other investigators looking into improprieties in the conduct of intelligence at CIA, the Department of Justice was not investigating the CIA for improprieties in the conduct of intelligence?"

Although the corpus of evidence is best considered as a whole, the Defendant makes a number of declarations on files in isolation that are overly simplistic and misleading. The Defendant states, "GAO is not one of the committees, agencies, and/or offices enumerated in the statute such that its investigations might trigger an exception to the operational file exemption." [Dkt 17, 2] That is certainly true. However, the GAO is an investigatory body that works only for Congress. Congress conducts investigations through GAO. Moreover, GAO works for the ***entire*** Congress, including "the congressional intelligence committees" to facilitate congressional oversight. The GAO describes how its investigative mandate is

conducted for the entire Congress on its website. "Our Work is done at the request of congressional committees or subcommittees or is mandated by public laws or committee reports. We also undertake research under the authority of the Comptroller General. We support congressional oversight by auditing agency operations to determine whether federal funds are being spent efficiently and effectively; investigating allegations of illegal and improper activities; reporting on how well government programs and policies are meeting their objectives; performing policy analyses and outlining options for congressional consideration; and issuing legal decisions and opinions, such as bid protest rulings and reports on agency rules. We advise Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive. Our work leads to laws and acts that improve government operations, saving the government and taxpayers billions of dollars." (See website GAO, U.S. Government Accountability Office, About GAO)

The 1978 investigatory report, *Nuclear Diversion in the US? 13 Years of Contradiction and Confusion* by GAO in which it clearly states that the CIA refused to cooperate with the GAO investigation, was delivered to every committee in Congress, including "the congressional intelligence committees." GAO's investigatory mandate of probing the Central Intelligence Agency implicitly included whether CIA improperly participated in the diversion, "The material was diverted to Israel by NUMEC management with the assistance of the Central Intelligence Agency (CIA)." [Doc 1, Exhibit 11, PDF Page 77] GAO's report, again delivered to the entire Congress, created even graver suspicious about the CIA's role in the affair. The Intelligence Oversight Committees, for which the GAO investigation specifically

into CIA improprieties was conducted, meets the criteria of "enumerated party #3" under 50 U.S.C. §3141 (c)(3).

The Defendant insists that disquieted members of Congress demanding briefings with CIA, including members of intelligence oversight committees, were visitors that the "CIA officers were informing, educating and advising members of Congress in connection with the alleged NUMEC diversion, rather than being the subject of a congressional investigation." [Wilson, Doc 17-2, page 26] The evidence itself disputes the CIA's benign characterization of the visits. Arizona Democrat Morris Udall asked bluntly on August 23, 1977 "Is it possible that President Johnson, who was known to be a friend of Israel, could have encouraged the flow of nuclear materials to the Israelis?" [Doc 16, Exhibit 17] and followed up with "If a diversion of nuclear materials had been authorized by the policy levels of the United States Government, how could this effort have been carried out?" [Doc 16, Exhibit 17] The clear implication was, if the answer was "yes," that JBJ would have turned to the CIA to secretly, and possibly illegally, to assist in the "flow of nuclear materials." These were investigatory probes into what illicit role the CIA had. They were not the friendly "educational" visits the Defendant wishes to portray.

It is important to emphasize that many congressional demands for CIA briefings were occurring as they eagerly awaited the 1978 GAO report—which are normally public domain, but in this case the CIA insisted be classified in their entirety. Senator Daniel K. Inouye, Chairman of the Senate Select Committee on Intelligence, demanded such a briefing on December 20, 1977, not for a friendly CIA "education" session on the NUMEC affair, but to get answers on any "CIA role in this matter." [Doc 16, Exhibit 17] This was a visit

conducted by as Senate Intelligence Committee awaited its copy of the soon-to-be classified GAO report. This unfriendly visit was representative of the mood, and extremely broad effort, including by the Department of Justice, NSC via presidential directive, to investigate improprieties in the conduct of intelligence by the CIA.

III. CIA Cannot Self-Exonerate on the Issue of Investigation into Improprieties

Although the CIA attempts to self-exonerate on the issue of whether it was the target of a Department of Justice investigation as an excuse for the inadequate scope of its search for responsive documents, it is not in a credible position to do so. All such exculpatory claims must be disregarded when so much evidence points to the contrary. The Plaintiff is confident that the evidence presented here is more than sufficient to compel a proper search of operations files for release and *in camera* review. Any one of the three enumerated parties calling for an investigation is more than sufficient to compel search and release under 50 U.S.C. §3141(c)(3).

The Plaintiff admits that in this case it would have been helpful if the only one of the three enumerated investigating parties subject to FOIA, the Department of Justice, had produced its investigative files about why it collected thousands of documents from CIA in addition to its final report (or even a draft) on the investigation's conclusion which was to be referred to congress. The Plaintiff believes such a release would have added to the mountain of inculpatory evidence. Unfortunately, the Department of Justice refused to properly respond to a 2011 Freedom of Information Act request filed by the Plaintiff for just such

material.

In 2011 the Plaintiff sought under the Freedom of Information Act the Department of Justice's Criminal Division final report and all related material on the CIA investigation. The FOIA request stated it was for the "three-man taskforce to investigate potential cover-ups of the diversion of weapons grade uranium to Israel from the Nuclear Materials and Equipment Corporation of Apollo, Pennsylvania We would like any final report by this task force, including relevant investigation files, correspondence, interview transcripts and other cross referenced information." (See Motion for Leave to File First Amended Complaint to Add Parties, Exhibit A.) On September 27, 2011, the National Security Division response stated "However we did not locate any responsive records." The Office of Information Policy accepted an appeal for records on October 13, 2011, denied in 2012. The administrative record reveals that the Department of Justice FOIA handlers never allowed the Criminal Division to receive or process the request. It has now become a matter of urgency that a *de novo* review of this failure—in addition to the CIA's FOIA scope issues—be executed immediately, and the Plaintiff solicits the court's permission to pursue this remedy.

IV. Requested Records Did Not Undergo Two Mandatory Decennial Reviews under 50 U.S.C. §3141(g)

Separate and apart from 50 U.S.C. §3141(b)(c)(d)and(e) matters is another open government provision within 50 U.S.C. §3141(g) with which the CIA must comply: Decennial review for release, as clearly stated in the statute:

(g) Decennial review of exempted operational files:

"(1) Not less than once every ten years, the Director of the Central Intelligence Agency and the Director of National Intelligence shall review the exemptions in force under subsection (a) of this section to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

(2) The review required by paragraph (1) 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.

(3) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining the following:

(A) Whether the Central Intelligence Agency has conducted the review required by paragraph (1) before October 15, 1994, or before the expiration of the 10-year period beginning on the date of the most recent review.

(B) Whether the Central Intelligence Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review."

The Defendant has provided no evidence that the required decennial reviews have taken place. The Defendant only claims that the CIA has ***processes*** in place to comply with

Section g, but provides no evidence that any have actually been applied in the case of the files sought by the Plaintiff. Given the CIA's history, including treatment of the so-called "torture tapes," CIA's lengthy claims of robust adherence to established procedures are doubtful, and repeating such claims should not be confused with actual evidence of compliance with the decennial review mandate as it pertains to the Plaintiff's FOIA request. Like the CIA's intimation that it processed the Plaintiff's 2010 FOIA request under a Division that did not even come into existence until 2015, the claim that proper decennial reviews were conducted should be presumed false until proven otherwise. The Plaintiff may blithely claim at the bar to have a "Maserati-ready garage." That does not mean the Plaintiff has ever, or will ever, actually own a Maserati.

The CIA's NUMEC files clearly merit consideration for release under subsection 50 U.S.C. §3141(g)(2) for their "historical value or other public interest in the subject matter of the particular category of files or portions thereof."

Public interest in what happened has been intense and ongoing since 1966. Scarcely a year passes in which the public health, foreign policy and environmental issues of the affair do not generate major "establishment" and "new" media investigations. In 2015 it was the report by Scott C. Johnson "What Lies Beneath?" *Foreign Policy*, May 23, 2015. Dozens of lawsuits raising relevant questions about premature death, major health damage, depressed property values in areas around the smuggling sites, liability of successor organizations that acquired NUMEC's plant and facilities after the major weapons-grade uranium loss period. (see *McMunn v. Babcock & Wilcox Power Generation Group, Inc.*, No. 2: 10cv143 (W.D. Pa. Feb. 27, 2014). Questions are ongoing about why the operation was so undercapitalized and had

such poor nuclear material record keeping. Absent from all of the accountability measures is any hard information about why CIA officials were so public in their convictions that the NUMEC facilities were a smuggling front, though obviously such information would be of high interest to many affected and interested parties. A survey conducted by the Plaintiff substantiates this.

In order to gage public interest in release of this category of files, the Plaintiff chartered Google Consumer Survey fielded on January 26, 2016[6] asking, "The CIA secretly believes in the 1960's a gov't contractor diverted US weapons-grade uranium to a foreign nuclear weapons program. The site will cost $500 million to clean up." The 1,501 respondents constitute a statistically significant sample of the US adult population. 58.0% of the respondents chose the answer, "The CIA's secret files should be released." 39.3% chose "The CIA's secret files shouldn't be released." The remainder (2.7%) filled in their own responses. The American public clearly feels entitled to know about this important matter.

The Plaintiff cannot know, and the Defendant has not divulged, what "category," if any exists, under which in 50 U.S.C. §3141(g) the NUMEC files fall. The Defendant claims that it assesses public interest by soliciting public comments through a notice published in the *Federal Register* regarding historical and other public interests that should be taken into account" and inviting "organizations known to have views about historical and other public interest to provide those views." An online search of the *Federal Register* website for the keyword "NUMEC" yields 20 documents.[7] None of them can be accurately characterized as

[6] Results of the survey may be audited online at https://www.google.com/insights/consumersurveys/view?survey=ovtjbvj4bhoqa&question=1&filter=&rw=1

[7] https://www.federalregister.gov/articles/search?conditions%5Bterm%5D=numec

CIA requests for input on this subject or category. Results do, however underscore ongoing public and agency interests and the historical and public interest nature of the affair and its costly aftermath. A similar search for "nuclear diversion CIA" yielded no relevant CIA request for public input. A search for "CIA historical release" revealed only a single document, but it was not a call for public input for the release of any operational files.[8]

This FOIA lawsuit is not theoretical or an exercise in review of agency procedures. The Plaintiff is therefore not interested in the CIA's claimed organizational procedures or boilerplate claims of adherence to those procedures that appear in many briefs filed by the CIA (and which contain inapplicable references to the Plaintiff's action, as is evident in the attached Plaintiff Opposition to Defendant's Statement of Material Facts as to which there is no Genuine Dispute). If the CIA is going to convincingly claim that it requested, through the *Federal Register*, public input on the release of thousands" of operations files on NUMEC, (or its "category") it should name the date, solicitation title and preferably the URL of when such notices were published in the *Federal Register*. Given the age of the CIA operations files in question, at least two such notices should be available.

Similarly, if the Defendant is claiming that it notified organizations known to have views about the historical or other public interest value of NUMEC or category files to provide those views, given the importance of this subject, it should name which organizations, when they were contacted, what information was conveyed to them and release a final report about why they ostensibly were of the opinion that nothing should be released. Did the CIA contact the organization of local Apollo, Pennsylvania environmental

[8] https://www.federalregister.gov/articles/search?conditions%5Bterm%5D=CIA+historical+release&commit=Go

activist Patty Ameno, who grew up alongside the Apollo plant, and has fought a running battle to compensate local victims for the toxic poisoning they suffered? Did the CIA contact the National Security Archive at George Washington University, possibly the largest single repository of officially released CIA operational files on earth, to assess their interest in the historical value of NUMEC or category operational files? If so, on what date? What was their response?

The National Security Archive is perhaps one of the most prominent destinations for permanent availability of formally classified CIA historical documents, such as those about the overthrow of Iran's elected leader Mohammad Mosaddeq[9], overthrow of Guatemala's elected president Jacobo Arbenz,[10] and the ill-fated Bay of Pigs operation.[11] Was the National Security Archive not interested or lacking an opinion on the historical value of NUMEC or category documents?

In short, the files the plaintiff seeks easily meet all of the criteria set forth concerning decennial review under 50 U.S.C. §3141(g)(2). The Defendant has not provided any admissible evidence that given the extreme public interest in and historical value of the documents sought in this action, it has properly reviewed its secret operational files as required under the decennial review. Enough time has passed that the secret operational files on NUMEC should have undergone at least two decennial reviews under 50 U.S.C. §3141(g)(2). Absent any real evidence to the contrary, the court should find the defendant is "improperly withholding records because of failure to comply" with 50 U.S.C. §3141(g)(2).

[9] CIA Confirms Role in 1953 Iran Coup http://nsarchive.gwu.edu/NSAEBB/NSAEBB435/
[10] CIA and Assassinations: The Guatemala 1954 Documents. http://nsarchive.gwu.edu/NSAEBB/NSAEBB4/
[11] Bay of Pigs, http://nsarchive.gwu.edu/bayofpigs/

V. CONCLUSION

For the foregoing reasons, this Court should deny summary judgment to the CIA and order the agency to search operations files and provide them for *in camera* review and release.

Dated January 28, 2016

Respectfully submitted,

Grant F. Smith, Pro Se
4101 Davis PL NW #2
Washington, DC 20007
(202) 640-3709

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-00224 (TSC)

CENTRAL INTELLIGENCE AGENCY

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Civil Rule 7(h)(1), Plaintiff hereby submits this response to the Defendant's Statement of Material Facts Not In Genuine Dispute. As set forth below, the purportedly material facts included in Defendant's Statement of Material Facts Not in Genuine Dispute do not entitle the Defendant to summary judgment due to errors, inadequate search, inappropriate and overbroad application of FOIA exemptions, lack of segregability, interplay between §552 and §3141, the premature nature of considering such a small set of documents and legal presumptions.

1. Disputed. The Plaintiff's FOIA request was indisputably not received by any Directorate of Digital Innovation, Agency Data Office *subsidiary* because it was filed in 2010. The new Directorate for Digital Innovation (DDI), a division that is

"the first in a half century" was "just launched" late in 2015.[1] It may, from that date on, have received FOIA requests. But it did not receive the FOIA request of relevance to this litigation. That the first alleged "fact not in dispute" is irrelevant CIA boilerplate rather sums up the agency's overall approach to the Plaintiff's FOIA request since 2010, including its failure to conduct a proper search.

2. Disputed. According to credible legal research cited in this filing, the CIA is institutionally biased against cases that rather obviously invoke the CIA Information Act of 1984 and does not proactively, and sometimes even reactively under direct court order, send FOIA cases to the Directorate of Operations to fulfill requests as required.
3. Disputed, because the CIA's institutional bias against abiding by the CIA Information Act of 1984 "searches" excluding what it deems "non-exempt repositories" are not "appropriate, " most especially in this case.
4. Undisputed.
5. Undisputed. Plaintiff respectfully adds that "terms to employ" in Plaintiff's request were inappropriately narrow, and did not leverage publicly known terms and those cited in the original complaint that could have unearthed significant documents, as related later.
6. Disputed. The Plaintiff FOIA in fact, was broad, requesting "declassification and release of all cross referenced CIA files related to uranium diversion from the

[1] Sean Layngaas, "Inside the CIA's New Digital Directorate" October 1, 2015 https://fcw.com/articles/2015/10/01/cia-digital-directorate.aspx,

Nuclear Materials and Equipment Corporation (NUMEC) to Israel. This request includes, but is not limited to CIA content provided for publication in the now declassified 1978 GAO report titled "Nuclear Diversion in the U.S.? 13 Years of Contradiction and Confusion." The cited GAO report includes information about investigations into CIA "improprieties in the conduct of intelligence" which should have triggered application of the CIA Act of 1984. It also contained many search terms that the CIA should have employed to find, review and release information.

7. Undisputed, but in error. The plaintiff believes that due to the nature of CIA's approach to the CIA Act of 1984, it largely predetermined that non-Directorate of Operations divisions were the only destinations where it wished to send the request. It has done the same for other FOIA requests. The original 2010 FOIA request had enough detail, however, for the CIA to have adhered to the statutory requirements under the CIA Information Act of 1984 and to have searched the Directorate of Operations. There was nothing inherent to the FOIA request that precipitated the CIA's mishandling of it, just and institutional bias.
8. Disputed. The Plaintiff does not dispute that the CIA "conducted a search of their non-exempt records repositories using a variation of terms including "NUMEC," "Nuclear Materials and Equipment Corporation," and "Uranium Diversion." However, that search should have employed terms the CIA knew were as relevant, given its long history with the matter and the reference to the GAO report supplied by the Plaintiff. These search terms include "Zalman

Shapiro" the plant operator CIA alerted top officials about in 1968, Rafael or "Rafi" Eitan, Israel's top covert operations official who visited NUMEC with an operations team under false pretenses in 1968 and about whom the CIA knows much, "Dimona" the nuclear weapons complex in Israel where the uranium ended up. In short, the search was overly narrow given the information referenced in the FOIA by the plaintiff. And, of course, the CIA did not search the Directorate of Operations as it should have given the particularities of this case.

9. Undisputed. It is surprising that the searches yielded much of anything, but that the information released to the Plaintiff was internal, bureaucratic management and oversight meta data about the public relations stakes in releasing information is not. The release was of little to no value to the Plaintiff or in assuaging the public interest in understanding the functions of government as it pertains to this matter.

10. Disputed. The Defendant implies, through ambiguity as to the *precise date* it allegedly "decided to conduct a review of classification determinations made for records responsive to Plaintiff's request, as well as supplemental search of DS&T databases for records responsive to Plaintiff's request," that the ISCAP ruling of March 18, 2014 overturning CIA's overly zealous classification and redaction determinations, were the impetus behind its new review and release of files to the plaintiff on August 31, 2015. That is extremely unlikely because on March 28, 2014 the CIA issued its final denial of the original 2010 FOIA numbered F-2010-

01210. At that point, it had no further statutory obligation to pursue additional action upon this closed FOIA action. It had discharged all of its administrative obligations.

The far more likely scenario is that sometime after the Plaintiff sued the Defendant for a *de novo* review by the court on February 13, 2015, CIA decided to compare the side-by-side ISCAP vs CIA redactions and was compelled by firm court deadlines to finally release relatively low-value information it knew to be no longer defensibly retained. This is known as a "limited hangout," and the CIA presumably hoped the FOIA would go away at that point.

The nature and timeline of the Defendant's decision to conduct a review is relevant and important to the Plaintiff. If it was some kind of a highly unusual, if not a historical first, response to an administratively dead FOIA proceeding, then the Plaintiff did not "substantially prevail" in his FOIA lawsuit and the Defendant will not have to pay the Plaintiff's court costs and other miscellaneous fees at the conclusion of this action.

However, if the Defendant's review and low-value document production were a product that was a response to the Plaintiff's lawsuit and his abundant painstaking exhibits of ISCAP vs. CIA redactions, which is the much more likely scenario, then the Defendant will be liable for Plaintiff's costs. Absent any real evidence about when the CIA began its "review" and why, the Court should assume it was a product of this action, that the date of true importance is February 13, 2015 (not March 18, 2014) and be prepared to award the Plaintiff court costs and other

miscellaneous costs at the conclusion of this action.

11. Undisputed. Especially given the narrow and inappropriate search terms used.
12. Undisputed.
13. Disputed. The Plaintiff herein supplies evidence and context about why operational files are releasable under 50 U.S.C. § 3141(c) and (g)
14. Undisputed. This is the CIA's predetermined, institutional approach to 50 U.S.C. § 3141(b) matters and it is wrong. Also, as noted by the Plaintiff, even when CIA has been ordered to release information under that statute, in at least one known case, it instead chose to destroy the material rather than release it.
15. Undisputed. The Plaintiff does not dispute that the Defendant has withheld material through inappropriate citations of many FOIA exemptions while ignoring superseding provisions contained within 50 U.S.C. § 3141 which should have been pursued first.
16. Undisputed. The Plaintiff does not dispute that the Defendant has withheld material through inappropriate citations of many FOIA exemptions while ignoring superseding provisions contained within 50 U.S.C. § 3141 which should have been pursued first.
17. Undisputed. The Plaintiff does not dispute that the Defendant has withheld material through inappropriate citations of many FOIA exemptions while ignoring superseding provisions contained within 50 U.S.C. § 3141 which should have been pursued first.
18. Undisputed. The Plaintiff does not dispute that the Defendant has withheld

material through inappropriate citations of many FOIA exemptions while ignoring superseding provisions contained within 50 U.S.C. § 3141 which should have been pursued first.

19. Undisputed.

20. Disputed. Plaintiff disputes that CIA has properly searched and reviewed information or appropriately applied the provisions contained within 50 U.S.C. § 3141(c)

21. Disputed. The Plaintiff notes that these were the same overblown, overgeneralized and all-encompassing justifications the CIA has used since 1978 to keep entirely benign equity in various reports—that ISCAP quite appropriately overruled—in 2014. As scholars and public interest researchers circulated the material—once again—none of the CIA's predictions of doom and gloom came to pass. They will similarly not come to pass—perhaps excluding some overdue accountability—when operations files are finally publicly released.

22. Disputed. If the FBI equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

23. Disputed. If the FBI equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

24. Undisputed.

25. Disputed. If the FBI equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

26. Disputed. If the FBI equities were intermingled with CIA information subject to

50 U.S.C. § 3141, they may be subject to release.

27. Disputed. If the US State Department equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

28. Disputed. If the US State Department equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

29. Undisputed

30. Disputed. If the withheld document was subject to any subsection of 50 U.S.C. § 3141, they may be subject to release.

31. Disputed. If the US State Department equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

32. Disputed. If the withheld document was subject to any subsection of 50 U.S.C. § 3141, they may be subject to release.

33. Disputed. If the withheld document was subject to any subsection of 50 U.S.C. § 3141, they may be subject to release.

34. Disputed. If the FBI equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

35. Disputed. If the FBI equities were intermingled with CIA information subject to 50 U.S.C. § 3141, they may be subject to release.

36. Disputed. If the withheld document was subject to any subsection of 50 U.S.C. § 3141, they may be subject to release.

37. Disputed. If the withheld document was subject to any subsection of 50 U.S.C. § 3141, they may be subject to release.

38. Disputed. If the withheld document was subject to any subsection of 50 U.S.C. § 3141, they may be subject to release.

39. Disputed. The FBI's investigations into NUMEC, began in the 1960s and ended in 1981. Few of the agents are likely still employed by the bureau. Even if they were, proper redaction procedures would not prohibit substantive release, as the FBI has already done on hundreds of NUMEC files.

40. Disputed. The FBI's investigations into NUMEC, began in the 1960s and ended in 1981. Few of the agents are likely still employed by the bureau. Even if they were, proper redaction procedure would not prohibit substantive release, as the FBI has already done on hundreds of NUMEC files. The appearance of a few such names is immaterial.

41. Disputed. Redactions of special agent names and identifying information can be redacted from investigatory documents, as the FBI has already done on hundreds of NUMEC files, without withholding the entire document.

42. Disputed. Redactions of such information can be redacted from investigatory documents, as the FBI has already done on hundreds of NUMEC files, without withholding the entire document.

43. Disputed. If the withheld document was subject to any subsection of 5 U.S.C. § 552 it should be released and reviewed.

44. Disputed. If the withheld document was subject to any subsection of 5 U.S.C. § 552 it should be released and reviewed.

45. Undisputed

46. Disputed. The record does not show all such procedures are rigorously followed.

47. Disputed. The record reveals sometimes information is arbitrarily determined to be "bad news" and summarily destroyed.

48. Disputed. The record reveals sometimes information is arbitrarily determined to be "bad news" and summarily destroyed.

49. Disputed. The record reveals sometimes information is arbitrarily determined to be "bad news" and summarily destroyed.

50. Disputed. The Plaintiff believes based on statutory requirements, that, this would more accurately and fairly be stated as, "Following the Plaintiff's lawsuit filed on February 13, 2105, the CIA decided...." etc. etc.

51. Undisputed.

52. Disputed. Entire pages have been redacted. The paragraphs indicate that the information was likely Directorate of Operations material swept up in the DOJ investigation. Lower value content is less redacted; seemingly higher-value content is highly redacted. More importantly, the perhaps single most important item, DCI's Helm's September 8, 1968 memo to the President, is almost entirely redacted.

53. Disputed. If the withheld document was subject to any subsection of 5 U.S.C. § 552 it should be released and reviewed.

54. No response required.

Dated January 28, 2016

Respectfully submitted,

Grant F. Smith, Pro Se
4101 Davis PL NW #2
Washington, DC 20007
(202) 640-3709

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-00224 (TSC)

CENTRAL INTELLIGENCE AGENCY

Defendant.

[PROPOSED] ORDER

Upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's Memorandum Opposing the Motion for Summary Judgement it is hereby

ORDERED that Plaintiffs' motion is GRANTED, and further

ORDERED that Defendant's motion is DENIED.

Dated

Judge_____