

James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “1”

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

THE JAMES MADISON PROJECT

Plaintiff,

v.

Civil Action No. 08-0708 (JR)

CENTRAL INTELLIGENCE AGENCY

Defendant.

* * * * *

**RULE 56(f) DECLARATION OF
DEPUTY EXECUTIVE DIRECTOR BRADLEY P. MOSS, ESQ.**

I, BRADLEY P. MOSS, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of the plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (filed August 11, 2008).

2. I am the Deputy Executive Director of the plaintiff James Madison Project (“JMP”) and have served in that position since 2007. JMP is a Washington, D.C.-based non-profit organization created for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. Much of the work undertaken by JMP involves litigation under disclosure acts such as the Freedom of Information Act (“FOIA”). The principles underlying the objectives of the JMP are derived from the 1997 findings of the Commission on Protecting and Reducing Government Secrecy. Our website, which contains further information and examples of JMP’s activities, can be viewed at <http://www.JamesMadisonProject.org>.

3. I am also an attorney of record in this litigation for JMP. I am admitted to practice law in the State of Illinois and the District of Columbia, as well as the D.C. Circuit and the United States District Courts for the District of Columbia, Maryland, and Northern District of Illinois.

Procedural Background

4. By letter dated October 18, 2007, I submitted on behalf of JMP's Executive Director, Mark S. Zaid, a FOIA request to the Central Intelligence Agency ("CIA") which sought copies of all internal CIA documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's Office as a whole. I enclosed with the request copies of newspaper articles from the *New York Times*, *Los Angeles Times*, and *USA Today* that confirmed that the CIA's Director General Michael Hayden ("Director Hayden") had ordered an internal review. The letter also stated that JMP was seeking expedited processing of the request as well as a fee waiver

5. By letter dated November 5, 2007, the CIA acknowledged receipt of the request and assigned it Request No. F-2008-00103. The letter noted that the CIA was granting JMP the fee waiver for the request, but that it was denying expedited processing. The letter also stated that, unless JMP objected, the CIA would limit its search to CIA-originated records existing as of the date of the letter.

6. JMP did not object to the temporal limit being imposed upon the parameters of the CIA's search at that point in time, or the limitation to CIA-originated records.

7. On February 21, 2008, having not received any further response from the CIA since the acceptance letter, I contacted the CIA's FOIA Requester Service Center ("FOIA

Center”) seeking a status update. I was informed by a FOIA Center staff member that the request was still being processed and that no additional information could be provided. I was also told that, due to the routine backlog, delays should be expected but that the FOIA Center was attempting to work through the backlog as quickly as possible.

8. By letter dated March 3, 2008, the CIA memorialized the substance of the conversation I had had with the FOIA Center, namely, that the request was still being processed and that there was a significant backlog causing the delay in the CIA’s response.

9. No further responses were ever received from the CIA. Therefore, after more than five months of administrative delay, and with no identifiable timeframe in which the CIA was planning to fulfill its legal obligations under the FOIA, JMP filed suit in this Court on April 21, 2008.

10. By e-mail dated June 4, 2008, Judith Kidwell (“Ms. Kidwell”), the Department of Justice attorney representing the CIA, sought my consent for her motion for enlargement of time. On that same day, I talked with Ms. Kidwell via telephone and indicated my consent to her motion for enlargement of time. This constituted the only attempt ever made by Ms. Kidwell to discuss the present case with me prior to the filing of dispositive motions.

11. By letter dated July 11, 2008, the CIA informed JMP that it had conducted a search for records responsive to JMP’s request and that the search had not identified any responsive records. The letter stated that the search had been conducted for responsive records that existed as of November 5, 2007, the date of the original acceptance letter by the CIA.

12. On July 14, 2008, the CIA filed its Motion for Summary Judgment, claiming that it had conducted an adequate search for responsive records and that there was no genuine issue of material fact with regard to the adequacy of the search.

Substantive Response On Adequacy Of The Search

13. The CIA relies on the Declaration of Delores M. Nelson, Chief, Public Information Programs Division, Information Review and Release Group, Information Management Services, Office of the Chief Information Officer (dated July 14, 2008) (“Nelson Declaration”)(cited as “Nelson Decl.”) to support its determination that the search conducted was adequate.

14. For approximately eighteen (18) months, as both a private attorney and as the Deputy Executive Director of JMP, I have participated in the litigation of several FOIA lawsuits. See, e.g., SAE Productions, Inc. v. Federal Bureau of Investigation, Civil Action No. 07-0866 (D.D.C.)(JR); The James Madison Project v. Central Intelligence Agency, Civil Action No. 07-01154 (D.D.C.)(RMU); The James Madison Project v. Central Intelligence Agency, Civil Action No. 07-01382 (D.D.C.)(RMU); The James Madison Project v. Central Intelligence Agency, Civil Action No. 07-02306 (D.D.C.)(RBW). In each of those cases, the agency’s FOIA declaration has tended to be filled with pages upon pages of generalized boilerplate descriptions of the process by which the agency coordinates FOIA requests and how generic classification determinations are rendered. Ms. Nelson’s declaration is no different.

15. Indeed, Ms. Nelson chose to include three entire paragraphs containing generic, boilerplate information pertaining to FOIA exemption and segregability determinations. Nelson Decl. at ¶¶ 12-14. Given that the CIA’s search did not identify any responsive

records, the CIA did not even have to conduct any FOIA exemption or segregability determinations. Ms. Nelson's inclusion of the irrelevant information should raise concerns as to the CIA's good faith in its submission of an affidavit that is required to be "sufficiently detailed" and to provide this Court with sufficient factual context in which to assess the adequacy of the CIA's search. The rest of Ms. Nelson's declaration does little to assuage those concerns.

16. Specifically, the CIA fails to sufficiently describe the scope of search terms and location parameters utilized in conducting its search. The entirety of its explanation consists of two mere sentences that rely heavily upon conclusory adjectives and ambiguous language. See Nelson Decl. at ¶ 19 ("The CIA search *included* the Director of Central Intelligence Agency ("DCIA") area, *which includes* the records systems of the DCIA Action Center ("DAC") and the independent offices of the Office of Inspector General ("OIG"), the Office of General Counsel ("OGC"), and the Office of Public Affairs ("OPA"). These offices used a variety of search terms . . . , *including, for example:* 'internal review of operations,' 'CIA's Inspector General,' 'John L. Helgerson,' 'OIG,' 'Office of Inspector General,' 'OIG internal review,' and 'Deitz review.'") (emphasis added). This explanation leaves open several evidentiary gaps, including, for example: 1) whether the CIA search included components other than the DCIA area; 2) whether the search within the DCIA area actually involved the record systems of the DAC, OIG, OGC and OPA; 3) whether other record systems within the DCIA area were searched; 4) which of the "example" search terms were used in which particular records systems; 5) what other search terms were used in conducting the search; and 6) whether and to what degree the CIA revised its initial search in light of information discovered

during initial phases of the search, including information from relevant but non-responsive documents.

17. Furthermore, the Nelson declaration does not address, let alone explain, how the imposition of the original “end-date”, November 5, 2007, was still reasonable at the time that the CIA’s search was conducted. The internal review authorized by Director Hayden reached its conclusion in February 2008, resulting in the creation of an ombudsman and a “quality control officer” to oversee the Office of the Inspector General (“OIG”), as well as the imposition of modified controls on the OIG’s investigative procedures. See Exhibit “2;” Exhibit “3.” In addition, the OIG was required by the Central Intelligence Agency Act of 1949 (“CIA Act”) to create three reports during the course of the “internal inquiry” detailing the activities of the OIG; those reports would, by necessity, have included information concerning the “internal inquiry” and the changes that were implemented as a result. At least one of those reports was submitted by Director Hayden to Congress’s two intelligence committees.¹ Arguably all of this information would have fallen within the scope of JMP’s request.

18. Because material facts, such as described above, still remain at issue regarding the adequacy of the CIA’s search, the CIA’s Motion for Summary Judgment should be denied pending, at a minimum, the submission of a more sufficiently detailed CIA affidavit. Alternatively, JMP should be permitted to undertake limited discovery in order to address the disputes surrounding the adequacy of CIA’s search. Discovery need not be overly burdensome or excessive in scope. A limited number of interrogatories and

¹ Due to the unclear language in the CIA Act regarding the timing of the CIA Director’s submission of these reports to Congress, it is impossible to tell exactly how many reports Director Hayden should have submitted to Congress by this time.

depositions will be necessary to identify the full scope of responsive regulations that exist and assess whether the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information. Discovery would address several previously-identified gaps in the CIA's description of its search for records, including, for example: (1) which particular search terms were utilized with respect to different particular components or offices; (2) to what extent, if any, the CIA revised its search in light of identification of relevant yet non-responsive documents; and (3) whether the original "end-date" was imposed as a limitation on the search.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: August 11, 2008

/s/

Bradley P. Moss