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

JAMES MADISON PROJECT	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 1:08cv1323
	*	(GBL/TRJ)
CENTRAL INTELLIGENCE AGENCY	*	
	*	
Defendant.	*	
	*	

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OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff James Madison Project ("JMP")[1] commenced this litigation pursuant to the Freedom of Information Act ("FOIA") to obtain copies of Central Intelligence Agency ("CIA") documents pertaining primarily to the indexing and organizational structure of CIA Systems of Records subject to FOIA and the search tools and indices employed by CIA components when performing searches pursuant to FOIA requests.

The CIA failed to respond to JMP's request in a timely fashion, and when it did respond well after the commencement of litigation (one day prior to the Government's filing of the Answer), the response asserted that four out of the six categories of records requested were not "reasonably described" for the purposes of 5 U.S.C. § 552(a)(3)(A).[2]

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[1] JMP (*http://www.JamesMadisonProject.org*) is a Washington, D.C.-based non-profit organization that was created in 1998 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 FOIA.

[2] The response also indicated that a search was performed for the remaining two categories of records that pertained to comments JMP submitted to IMS in response to a Notice of Proposed Rulemaking, 73 Fed. Reg. 20882 (April 17, 2008). After reviewing the CIA's affidavit on this issue, JMP is willing to concede that the search for these records was reasonable, although the evident lack of attention paid to comments

The record reflects, however, that the CIA's assertions that these requests were either not reasonably described or unduly burdensome are without merit, and that by its conduct before and during litigation the CIA has violated its own internal regulations and FOIA. As a result, this Court should deny the CIA's request for summary judgment and either remand the case to the CIA to perform an adequate search or allow JMP to conduct limited discovery to identify the proper scope of its response.

STATEMENT OF MATERIAL DISPUTED FACTS

The factual and procedural background concerning JMP's FOIA request at issue in this litigation is set out in detail in the CIA's Memorandum in Support of Defendant's Motion for Summary Judgment (filed March 18, 2009) ("CIA's Memo"), the CIA's Declaration of Delores M. Nelson (dated March 17, 2009) ("Nelson Declaration"), the CIA's Declaration of Joseph W. Lambert (dated March 17, 2009) ("Lambert Declaration"), and JMP's Rule 56(f) Declaration of Mark S. Zaid, Esq. (dated April 6, 2009) ("Zaid Decl.") (attached as Exhibit "A"), all of which are incorporated herein by reference. The factual statements made in the CIA's Memo and the Nelson Declaration are incorporated only in relation to pages 3 through 4 and paragraphs 12 through 13, respectively, and only to the extent that they do not constitute legal characterizations and conclusions. JMP disputes only the CIA's characterization of JMP's FOIA request as "not reasonably describing" the records sought, but admits that the CIA did make such a characterization. *See* Zaid Decl. at ¶¶ 10, 13.

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submitted regarding a Proposed FOIA Rule (that will ironically factor into JMP's argument) is definitely cause for concern.

ARGUMENT

The CIA has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950) ("[Summary judgment] should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." (citations omitted)). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Celotex Corp.*, 477 U.S. at 324.

In a FOIA case, the Court exercises *de novo* review and summary judgment is only available to a defendant agency that has fully discharged its obligations under FOIA. *See Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007); *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1246 (4th Cir. 1994); *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983).

I. JMP'S FOIA REQUEST REASONABLY DESCRIBED THE RECORDS SOUGHT AND GENUINE ISSUES OF MATERIAL FACT REMAIN PRECLUDING SUMMARY JUDGMENT AT THIS TIME

A. The CIA's Interpretation of the Requirement that a FOIA Requester Must Reasonably Describe the Records Sought Conflicts with the Unambiguously Expressed Intent of Congress

Both parties agree that FOIA requests must "reasonably describe" the records sought,[3] defining that term of art as "sufficient[] to enable a professional employee familiar with the subject to locate the documents with a reasonable effort." 32 C.F.R. § 1900.12(a) (2008), *tracking* H. Rep. 93-876, 93d Cong., 2d Sess. 6 (1974) [hereinafter 1974 House Report]. However, the CIA regulation's adjacent language in §§ 1900.02(m) and 1900.12(a) restricting this definition in terms of the request's compatibility with existing indexing systems is an impermissible interpretation of Congress' intent and must therefore be rejected. *See*, *e.g.*, *Dominion Resources, Inc. v. U.S.*, 219 F.3d 359, 365 (4th Cir. 2000) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect notwithstanding any contrary agency interpretation."), *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The statute's legislative history is the first tool of statutory construction a court utilizes to determine congressional intent when statutory language is unclear. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991). The legislative history of FOIA is rich and has been cited by many courts, as well as featuring prominently in the Department of Justice

[3] "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

("DOJ") *Freedom of Information Act Guide*.[4] *See*, *e.g.*, *Truitt v. Dep't of State*, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (discussing legislative history of 1974 FOIA amendments as related to requirements for describing requested records):

> The language "request for records which . . . reasonably describes such records" was inserted in 1974 [as § 1(b)(1) of Pub. L. No. 93-502] in replacement of the words "request for identifiable records," the terminology of Section 3 as originally enacted in 1967. Although the committee reports in both houses of Congress had declared that a "request for identifiable records" involved no more than a reasonable description enabling agency personnel to locate the records sought, and had warned that the 1967 statutory formulation was "not to be used as a method for withholding," the 1974 Senate Report noted that "cases nonetheless have continued to arise where courts have felt called upon to chide the government for attempting to use the identification requirements as an excuse for withholding documents."

Id. at 544 (footnotes omitted).

A more direct examination of the legislative history reveals extensive discussion attesting to how this amendment was supposed to "directly aid citizens in obtaining Government documents." 120 Cong. Rec. 6,807 (1974) (statement of Rep. Erlenborn). *See*, *e.g.*, 1974 House Report at 5-6 ("Section (1)(b) of the bill is designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents."); S. Rep. 93-854, 93d Cong., 2d Sess. 10 (1974) ("Agencies should continue to keep in mind . . . that their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records.") (internal quotations omitted)) [hereinafter 1974 Senate Report]; *id.* (asserting that the amendment "makes explicit the liberal standard for identification *that Congress intended* and that courts have adopted, and should thus create no new problems of interpretation"

[4] Office of Information and Privacy, U.S. Dep't of Justice, *Freedom of Information Act Guide*, 71 (Mar. 2007 ed.), *http://www.usdoj.gov/oip/foia_guide07.htm* (last visited April 3, 2009) [hereinafter "DOJ FOIA Guide"].

(emphasis added)), *cited by Truitt*, 897 F.2d at 545; 120 Cong. Rec. 6,809 (1974) (statement of Rep. Thone) ("Some agencies have interpreted [the 'identifiable records'] language so that a citizen can obtain a document only if he or she knows the precise title or the file number. To prevent such pettifoggery, we propose to amend the law so that agencies will have to respond to any request which 'reasonably describes such records.'").[5]

Because FOIA applies government-wide and no one agency administers it, no agency is entitled to *Chevron* deference in interpreting its provisions. *Am. Civil Liberties Union v. Dep't of Defense*, 543 F.3d 59, 66 (2d Cir. 2008), *citing Al-Fayed v. C.I.A.*, 254 F.3d 300, 307 (D.C. Cir. 2001); *Tax Analysts v. I.R.S.*, 117 F.3d 607, 613 (D.C. Cir. 1997) ("One agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency.").[6] In addition, even in cases in which *Chevron* applies, an agency's interpretation of a statute that conflicts with a prior interpretation is entitled to "considerably less deference" than a consistently held agency view. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Miller v. AT & T Corp.*, 250 F.3d 820 (4th Cir. 2001).

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[5] Of particular note here, if only for the sake of irony, is a comment offered by Acting Assistant Attorney General Malcolm D. Hawk in response to a request for the views of the Department of Justice on the FOIA Amendments bill. "[T]his amendment might lead to confusion as well as to unwarranted withholding of requested records. *An unsympathetic official might reject a request which would have to be processed today, on the new ground that the request is not reasonably descriptive.*" 1974 House Report at 15-16 (emphasis added). In light of recent agency trends, it appears Mr. Hawk was remarkably prescient.

[6] Due to a dearth of controlling authority in the 4th Circuit on some of the issues discussed herein, JMP respectfully suggests that in the absence of binding precedent D.C. Circuit decisions be accorded higher persuasive value than other non-binding federal circuits due to its arguably greater familiarity with FOIA cases involving federal defense and intelligence agencies. Citations in this brief have been chosen with that intention in mind.

In the case of the CIA regulations cited as justification for deeming these requests "not reasonably described," it is important to note that while 32 C.F.R. § 1900 was first published in 1973, neither the language

> Reasonably described records means a description of a document (record) by . . . descriptive terms which permit an Agency employee to locate documents with reasonable effort *given existing indices and finding aids*,

32 C.F.R. § 1900.02(m) (2008) (emphasis added), nor

> Commonly this equates to a requirement that the document must be *locatable through the indexing of our various systems*,

32 C.F.R § 1900.12(a) (2008) (emphasis added), appeared until much later. The regulation first mentioned "indexing or filing components" in any manner in 1975, and only then as a tool available to the responsible components. 32 C.F.R. 1900.41(a) (1975) ("Upon receipt of a copy of a request . . . the 'responsible components' . . . shall, with such assistance as may be appropriate from . . . such reference, indexing or filing components as may have . . . responsibilities with respect to any such records, undertake to locate the requested records."). In 1976, the language "The request . . . shall reasonably describe the records of interest" first appeared in 32 C.F.R. § 1900.11(c) without any clarifying remarks (presumably pursuant to the passage of the 1974 amendments), where it would remain unchanged until 1997. It was not until 1997, after 28 years of mentioning "indexing and filing components," that these two regulations actually contained the current language and fundamentally changed the regulation from encouraging responsible components to utilize indexing and filing tools to requiring that requesters couch their requests in terms of those tools. In addition, it is ironic at best and surreal at worst that, contrary to the narrow description offered in the CIA's Memo,[7] the proposed rule on which JMP was commenting actually would have removed the

[7] The CIA's Memo curiously omits this fact. CIA's Memo at 16 n.7.

offending fourth clause from § 1900.12(a) if enacted. *See* 73 Fed. Reg. 20883 (April 17, 2008).

Therefore, given the evidence that 1) it is improper to accord *Chevron* deference to an agency with respect to FOIA; 2) the CIA's interpretation of the FOIA's "reasonable description" standard has been and continues to be inconsistent with no apparent relationship to FOIA jurisprudence; and 3) the CIA's interpretation is in clear conflict with the legislative intent demonstrated in the legislative history, the Court should find that these offending clauses of 32 C.F.R. §§ 1900.02(m) and 1900.12(a) are not valid grounds for the CIA's determination that the JMP request did not reasonably describe the records sought.

B. The Nelson Declaration Is Wholly Insufficient For Purposes of Exemption Three[8]

Exemption Three of FOIA permits withholding information that is exempted from disclosure by another statute. 5 U.S.C. § 552(b)(3). The CIA Act exempts the CIA from compliance with any law requiring publication of disclosure of the CIA's organization and functions. CIA's Memo at 11 n.3. JMP does not dispute that the CIA Act, as amended, qualifies as a withholding statute under Exemption Three. In order to withhold information an agency must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King v. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987); *see also Church of Scientology, Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980) ("We have consistently maintained that vague, conclusory affidavits, or those that merely paraphrase the words of a statute, do

[8] Because the issue of the applicability of Exemption Three is not properly before this Court, JMP will not analyze the merits of the CIA's assertions at this point.

not allow a reviewing judge to safeguard the public's right of access to government records.")

The burden of demonstrating that the material in question was properly withheld commonly requires the preparation of a detailed Vaughn Index, which must "show specifically and clearly that the requested materials fall into the category of documents" that Congress has exempted. *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). *See also PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250 (D.C. Cir. 1993) ("[A]n affidavit that contains merely a 'categorical description of redacted material coupled with a categorical indication of anticipated consequences of disclosure is clearly inadequate.'"); *King*, 830 F.2d at 225 ("The measure of a Vaughn Index is its descriptive accuracy, and we are willing to accept innovations in its form so long, but only so long, as they contribute to that end.").

The CIA has asserted that under the CIA Act and Exemption Three, documents sought in categories one, three, and four would be exempt from disclosure "because they seek identification of components of the CIA." CIA's Memo at 11 n.3. In order to justify this statement CIA submitted the Nelson Declaration. This affidavit does not satisfy the burden of specificity, as it does not make mention of anything beyond a general statement that "[i]n light of the subject matter of items 1 through 4 of Plaintiff's current request, little, if any, information could be responsive to those items, regardless of the formulation used in the request, other than information disclosing the CIA's organization or functions." Nelson Decl. at ¶ 29. As no search has been performed, no records reviewed, no Vaughn Index prepared, and nothing at all included to support this assertion other than "a vague, conclusory affidavit[] . . . that merely paraphrase[s] the words of a statute," *Church of Scientology, Inc. v. Turner*, 662 F.2d at 787, the CIA has

not provided sufficient information to "enable this Court to make a rational decision [regarding the indirect invocation of Exemption Three], as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." *Dellums v. Powell*, 642 F.2d 1351, 1360 (D.C. Cir. 1980). Therefore, the CIA's Motion must be denied and discovery permitted to assess the appropriateness of the invocation of the exemption.

C. The CIA Violated Its Own Regulations By Rejecting JMP's FOIA Request Without First Discussing It

According to *Ruotolo v. Dep't of Justice, Tax Division*, 53 F.3d 4, 10 (2d Cir. 1995), an agency "has no right to resist disclosure because the request fails 'reasonably [to] describe' records unless it has first made a good faith attempt to assist the requester in satisfying that requirement [pursuant to its internal regulations]." *See also* DOJ FOIA Guide at 73 n.139 (classifying the *Ruotolo* holding as "concluding that agency failed to perform its 'duty' to assist requester on reformulating request"). The CIA violated its own regulations by not engaging in a dialog with JMP prior to rejecting this request. *See* 32 C.F.R. § 1900.12(c) ("Communications which do not meet these requirements will be considered an expression of interest and the Agency will work with, and offer suggestions to, the potential requester in order to define a request properly."). Therefore the CIA's Motion should be denied.

D. JMP's Request Reasonably Described the Records Sought[9]

For the purpose of summary judgment, courts have yet to set forth a clear standard to be applied in a situation where a defendant agency has categorically refused

[9] Hereinafter references to "the request" or "the records sought" are limited to Categories One, Three, and Four unless otherwise expressly indicated, since JMP has withdrawn its challenge with respect to Counts Two, Five and Six. *See* Note 2 *supra*; Note 24 *infra*.

to even process the request and perform the search. In virtually all prior cases in which the defendant agency has alleged that the records were not "reasonably described," the issue at hand has always been the adequacy of the agency's search.[10] In the instant case, the CIA's determination before processing *any* search on Categories One through Four that the records were not reasonably described should not be subject to the "reasonableness" standard commonly used in cases pertaining to the adequacy of the search because of the significantly greater detrimental effect to the requester of this type of agency action. [11]

When the adequacy of an agency's search is challenged, the burden rests upon the defendant agency to "demonstrate[] that it has conducted a search reasonably calculated to uncover all relevant documents." *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1246 (4th Cir. 1994); *see also*, *e.g.*, *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (an agency "must show that it has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested" (citations omitted)); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1988) ("reasonableness" standard is applied to determine the adequacy of a search methodology, consistent with congressional intent tilting the scale in favor of

[10] JMP uses the modifier "virtually" here only in honest recognition that its research may have missed a little-known case on point. However, after extensive research into the matter, no cases were found that shared this particular fact pattern, and none were cited in the CIA's Memo. Therefore, this seems to be a case of first impression for any federal court.

[11] The practice of importing standards and principles from one body of law to another based on similar factors is not without precedent. In the FOIA context, "[c]ourts which have considered the interrelationship between the Federal Rules [of Evidence] regarding discovery and the FOIA have begun to recognize that, while their policies and purposes differ, they have some analagous provisions to which functionally equivalent standards and principles apply." *Bank of Am. v. U.S.*, No. C-76-1757, 1978 WL 4492, *3 (N.D.Ca. May 24, 1978) (unpublished table decision) (listing cases as examples).

disclosure); *Weisberg*, 705 F.2d at 1351 ("The adequacy of an agency's search is measured by a standard of reasonableness and is dependent upon the circumstances of the case." (internal quotations and citations omitted)).[12]

However, in cases involving agency invocations of FOIA exemptions, "any factual conclusions that place a document within a stated exemption of FOIA are reviewed under a clearly erroneous standard." *Ethyl Corp.*, 25 F.3d at 1246; *see also id.* at 1248 ("[A]ll of the exemptions contained in [FOIA are] to be construed narrowly, and the burden rests upon the government to be precise and conservative in its privilege claims."); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("[FOIA] exemptions are explicitly made exclusive and must be narrowly construed.").

Lacking guidance from any other source, simple logic would arguably dictate that assessing an agency's refusal to even perform a search (thereby denying a requester access to records) is more analogous to assessing an agency's decision to withhold records by way of a FOIA exemption than to assessing the adequacy of an agency's search. Because of this distinction, the congressional intent in favor of disclosure cited by *Campbell* would logically necessitate that such an action would carry a higher burden of proof.[13] In contrast to the instant case, if an agency performs an inadequate search, it has not *refused* to disclose the records sought but rather failed to properly conduct the

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[12] It is also undisputed that a court may rely upon agency affidavits in adjudicating the adequacy of the search, *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979), so long as those affidavits are detailed, nonconclusory and submitted in good faith. *Goland v. C.I.A.*, 607 F.2d 339, 352 (D.C. Cir. 1978); *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (*per curiam*).

[13] *Cf. Founding Church of Scientology*, 610 F.2d at 837 ("To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if . . . an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.").

search for those records. As a practical matter, there is a chance that it might not find any or all of them during the course of the search, but there is also a chance that it might find *some* of them.[14] Similarly, if an agency denies a requester a fee waiver (which is also reviewed on a reasonableness standard), the agency has not *refused* to disclose the records sought; it has simply put a price on their disclosure (which agencies are authorized to do under FOIA).[15] As a practical matter, if the requester agrees to pay the required fees, the agency will disclose the records.

In contrast, invoking a FOIA exemption involves denying access to records regardless of the nature of the agency's search. In such a situation, the requester is left with no viable means to procure the records sought short of challenging the agency's decision in federal court. As a practical matter, this is most analogous to the issue at hand. If an agency claims that a request does not reasonably describe the records sought, the requester has very few alternatives, none of them truly equitable; the agency has refused to even search for records, let alone disclose them. By forcing the requester to either abandon his attempts to acquire the records or narrow the scope of his request before a search will even be performed, the agency is in effect refusing to disclose that portion of the records that he was forced to eliminate from the request, leaving the requester no means to both placate the agency and acquire the records to which he would

[14] Because this is a case of first impression, this argument reluctantly relies heavily on the legally questionable but practically sensible axiom that "something is better than nothing."

[15] The "reasonableness" standard is also applied to agency decisions to deny requests for expedited processing and to segregate exempt material from releasable material, but those standards are explicitly mandated in FOIA and thus are not relevant to this analysis. *See, e.g.*, 5 U.S.C. §§ 552(a)(5)(E)(v)(I), 552(b)(9).

otherwise be entitled under FOIA short of litigation.[16] The alternatives available to such a requester are fundamentally inconsistent with FOIA, thereby necessitating strict examination of the agency's decision, in the same critical way in which courts treat claimed exemptions, which by their very nature are inimical to "the basic policy that disclosure, not secrecy, is the dominant objective of the Act. *Rose*, 425 U.S. at 361. Such is the case with cases involving FOIA exemptions, and courts agree that Congress intended for it to be difficult for agencies to prove the need for an exemption except in very narrow circumstances.

1. Category One of JMP's Request Reasonably Described the Records Sought

Courts have found that requests fail to meet FOIA's "reasonably described" requirement for four reasons. CIA's Memo at 6. However, because these reasons overlap and are often confused, the following analysis will instead proceed according to the Categories of the request, fully discussing all of the CIA's stated problems with each category before moving on to the next.

In Category One, JMP requested "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)." Nelson Decl. at 6. The CIA argues that the records sought were not reasonably described due to vagueness and broadness, and that any search for responsive records would be unduly burdensome. CIA's Memo at 9-10. This determination is based on a fundamentally flawed understanding of the scope of the cases cited to support the

[16] In a situation where the description of the records is necessarily broad in scope, as with the instant case, this inequity is exacerbated.

CIA's argument, as well as an unreasonably broad mischaracterization of the scope of JMP's request.[17]

a) Category One of JMP's Request Was Not Unreasonably Vague

The CIA cites multiple cases to support the rule that the description can be considered "not reasonably described" if it is too vague to allow the agency to determine precisely what records are being requested. CIA's Memo at 6-7, *citing*, *e.g.*, *Hudgins v. I.R.S.*, 620 F. Supp. 19, 21 (D.D.C. 1985), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987) (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); *Mason v. Calloway*, 554 F.2d 129, 131 (4th Cir. 1977) (holding 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) (parentheticals in original). While this summary of cases is factually accurate (even though it actually understates the extremity of the cases in a few places), it is not relevant to the CIA's subsequent analysis of Category One.[18]

[17] While JMP will easily concede that the Nelson Declaration reflects a pervasive mischaracterization of the scope of the request, this should not be read to imply that the records sought were not reasonably described. Purely semantically, one cannot interpret the "reasonably describe" requirement to allow an agency to *unreasonably* mischaracterize a request for reasonably described records. FOIA requires that the requester reasonably describe the records sought; it does not punish requesters who do so just because the agency interpreted it in a completely unreasonable and unforeseeable manner, as the CIA did here.

[18] While *Hudgins* was a truly remarkable case of how not to write a FOIA request, it is unclear why the CIA cited it here, as it has no nexus with the vagueness doctrine it is purported to support. The FOIA request in question in *Hudgins* was deemed not to be "reasonably described" because it attempted to "require[] an agency to answer questions disguised as a FOIA request or to create documents or opinions in response to an

Of all the cases cited by the CIA, the most potentially analogous is *Mason*. *Mason* involved an astoundingly vague FOIA request for

> all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs . . . , including, but not limited to, the files of (various government offices).

Id. at 131. JMP does not dispute that the request at issue in *Mason* was vague and therefore not reasonably described, but on the contrary posits that it indeed serves as a perfect example of the type of request that Congress was trying to restrict. The case at bar, however, does not involve such a request, as any possible vagueness falls far short of the high water mark set by *Mason*.

A far more analogous case is *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935 (D.C. Cir. 1970), even though it predates the "reasonably describes" language added by the 1974 FOIA Amendments.[19] In *Bristol-Myers*, the FTC had initiated a rulemaking proceeding and had indicated in the *Federal Register* the involvement of "extensive staff investigation, . . . accumulated experience and available studies and reports. 32 Fed. Reg. 9843 (July 6, 1967). The plaintiff filed a FOIA request for material that "ha[d] contributed to or constitute[d]" those topics, and the FTC argued that the request had not sought any identifiable records. *Bristol-Myers*, 424 F.2d at 937, 938 n.7. The court held that "[t]he F.T.C. can hardly claim that it was unable to ascertain which documents were sought by Bristol-Myers [because the] Commission relied on certain materials in

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individual's request for information." *Id.* at 22. Therefore it will be discussed more thoroughly in the section on Category Three, where the CIA raises that issue.

[19] In fact, *Bristol-Myers* was specifically cited in the 1974 Senate Report as one of the cases in which the government had been found to be attempting to use the "identifiable records" requirement as an excuse for withholding documents. 1974 Senate Report at 10.

promulgating its proposed rule, and referred to them in announcing the rulemaking proceeding. *Id.* at 938.

Category One requested documents pertaining to the indexing and organizational structure of all CIA Systems of Records subject to FOIA. The CIA argues first that this request was confusing because the term "system of records" was a statutory term of art used in the Privacy Act. *See* CIA's Memo at 9. This argument is completely without merit. While the Privacy Act does assign a statutory definition to a "system of records,"[20] it is disingenuous to suggest that no plain language meaning exists, especially in the face of evidence of usage by both the CIA and JMP. During *U.S. Student Ass'n v. C.I.A.*, 620 F.Supp. 565 (D.D.C. 1985), a FOIA case involving files maintained by the CIA Directorate of Operations, the plaintiff's attorney performed a deposition of Louis J. Dube, Information Review Officer of the Directorate of Operations. In that deposition, the following exchange occurred:

> Q. Now, in response to Interrogatory No. 10, the Agency responds that in order to fully answer this interrogatory – quote – all CIA files or *systems of records* would need to be searched. Is that your understanding of the Agency's obligation?
> A. There is no way that any man in this building can say that, when they search every directorate, they have retrieved every document on the subject.

Exhibit "B" at *19-*20 (particular pages from the transcript of Louis Dube's December 21, 1983 deposition in *U.S. Student Ass'n v. C.I.A.*, 620 F.Supp. 565 (D.D.C. 1985)) (emphasis added). Of interest here is the fact that not only did a CIA Information Review Officer acknowledge the use of the term "system of records" during a deposition (which in and of itself would not be probative, since the plaintiff's attorney actually spoke the

[20] 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).

words), but that the plaintiff's attorney was *quoting* from a formal sworn CIA response to an interrogatory[21] which used the very phrase that the CIA's Memo states has no meaning outside of the Privacy Act.

In addition, the Proposed Rule published by Joseph Lambert in the *Federal Register* mentioned *supra*, Note 2, specifically stated its purpose to "revise its FOIA regulations to more clearly reflect the current CIA organizational structure [and] record system configuration. 73 Fed. Reg. 20881 (April 17, 2008). This fact was noted in the JMP Comments attached to the FOIA request which were the subject of Categories Five and Six, stating in pertinent part,

> [N]ot enough is known about the CIA's FOIA *record system configuration* to be useful to most requesters. On the other hand, the CIA's Privacy Act *record system configuration* is exhaustively detailed in the 22 July 2005 *Federal Register*, and as such allows astute Privacy Act requesters to be highly specific in their requests. Therefore, the recommended solution to this lack of information is the initiation by the CIA of a zero-based, Agency-wide review of its Freedom of Information Act *systems of records* as was completed in 2005 with respect to the CIA's Privacy Act *systems of records*, culminating in the drafting and publication of a comparable set of Freedom of Information Act notices that would more accurately describe the *records systems* currently maintained by the Agency.

Nelson Decl. Exhibit "1" at 6 (JMP's comments on the proposed rule, attached to the original FOIA request) (emphasis added). Unless the court accepts that the employee processing the FOIA request did not read the attached letter that was the subject of two out of six categories of records sought, it is wholly unreasonable that the employee did not know, to use the D.C. Circuit's language, "precisely which of its records had been requested and the nature of the information sought from those records." *Yeager v. D.E.A.*, 678 F.2d 315, 326 (D.C. Cir. 1982) (applying language from the 1974 Senate Report to find that the "linchpin inquiry is whether the agency is able to determine

[21] Unfortunately, JMP does not possess the interrogatory itself for appropriate citation, only the deposition.

'precisely what records (are) being requested'" and that a request for all the records within a particular computer system was not overbroad and was reasonably described).

However, most telling of all is the fact that these records systems are discussed at length in the very Nelson Declaration filed in this litigation. According to Ms. Nelson:

> Because CIA's *records systems* are decentralized, each directorate [Information Review Officer (IRO)] must determine what *component(s)* within the directorate might reasonably be expected to possess [responsive] records . . . and then work with personnel within each of those *components* to devise a search strategy tailored to the *component's configuration of its records systems and unique characteristics of that configuration*. This process includes identifying which *records systems* to search and which *search tools, methods, and terms to employ*.

Nelson Decl. at ¶ 8 (emphasis added). This declaration, variants of which are filed with every Motion for Summary Judgment in CIA FOIA cases, almost singlehandedly makes *Bristol-Myers* the most persuasive authority, containing as it does a veritable road map to a perfectly reasonable search for responsive records. *See Bristol-Myers*, 424 F.2d at 938 ("The F.T.C. can hardly claim that it was unable to ascertain which documents were sought by Bristol-Myers [because the] Commission relied on certain materials in promulgating its proposed rule, and *referred to them* in announcing the rulemaking proceeding.").

For Category One, the search would simply need to be tasked to each IRO to process a search in each component in the respective Directorate for records describing *the component's configuration of its records systems and unique characteristics of that configuration.* For Category Three, the search would be even simpler. The request would need to be tasked to each IRO to conduct a search *in his respective office* for *a list of components in his Directorate* that are available for conducting searches. For Category Four, the request would merely need to be tasked to each IRO to process a

search in each Directorate component for records pertaining to the component's *available search tools and methods* that can be applied when processing FOIA requests.[22]

b) An Agency Search for Records Responsive to Category One Would Not Constitute an Unreasonably Onerous Search of a Large Amount of Records and Would Not Impose an Undue Burden on the Agency

The CIA cites multiple cases to support the proposed rule that the description can be considered "not reasonably described" if 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. CIA's Memo at 7-8, *citing*, *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) (parentheticals in original).

It also cites cases to support the assertion that "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." CIA Memo at 8-9 (internal quotations omitted), *citing*, *e.g.*, *Am. Fed. of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (plaintiff sought every chronological file and correspondent file, internal and external, for *every* office in the Census Bureau and

[22] This search strategy was in fact what was visualized when JMP made this request, which is why the language of the request tracks the Nelson Declaration so closely. Zaid Decl. at ¶ 13.

every division or staff administrative office file in the Bureau which records, catalogues, or stores SF-525 or stores promotion recommendations memos, or both); *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)."). Although the CIA's Memo initially divides these issues, it applies them virtually interchangeably to JMP's FOIA request, and so they will be addressed together here.[23]

Unlike with the summary of relevant cases offered to support CIA's vagueness argument, JMP is in complete agreement with the CIA's assessment of the listed cases, with the possible exception of the unqualified adjective "large" in the phrase "unreasonably onerous search of a *large* volume of records." While JMP does agree that this is technically an accurate adjective, a close examination of parenthetical factual summaries of the listed cases (in fact, of most of the cases in this area) demonstrates that all of these cases involved requests that would require an agency searching through an *unbelievably* large volume of records or otherwise performing a truly *unbelievably*

[23] The distinction, if there is truly one, is very subtle, and many of the cases cited do in fact seem to use the language almost interchangeably, supporting both the CIA's and JMP's treatment of the issues. However, according to the DOJ FOIA Guide, "The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A)." DOJ FOIA Guide at 74, *citing Ruotolo*, 53 F.3d at 10. Given the prominence of this treatise as a practically definitive text for government FOIA analysts, it is curious that the CIA would take such a clearly contrary position as it has here.

burdensome search, a magnitude of unreasonableness that is not imposed by JMP's FOIA request.[24]

In contrast to these cases, processing Category One would only, as CIA's Memo states, "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."[25] CIA's Memo at 11. While the CIA alleges that *Dale* and *Marks* stand for the rule that "requests which require an agency to search each of its offices fail to reasonably describe the records sought," *id.*, those cases, as well as *Freeman* and *Am. Fed'n of Gov't Employees, Local 2782*, involved the possibility of searches across hundreds of field offices, not the possibility of a search of components of an agency presumably comprised of several buildings on at most a handful of compounds around the Washington Metro Area. The difference in magnitude required to trigger this rule is vast, and unlike most of the relevant case law involved in this case, a 4th Circuit precedent speaks directly to this point. *See Wellford v. Hardin*, 315 F.Supp. 175, 177 (D.Md. 1970), *aff'd*, 444 F.2d 21 (4th Cir. 1971). *Wellford* held that

> It is clear from the affidavits in this case that the records sought are indeed identifiable. Mr. Lennartson, the Director of the Consumer and Marketing Service, stated:

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[24] *See, e.g.*, *Irons*, 465 F.2d at 26 (performing the search would have required manually searching through over 3,500,000 files); *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (requesters asked Customs to search manually through 23 years of unindexed files); *Am. Fed'n of Gov't Employees, Local 2782*, 907 F.2d at 205 (necessary search would have involved virtually every file in every office across the country); *Freeman v. U.S. D.O.J.*, 808 F.2d 834 (4th Cir. 1986) (unpublished table decision) (requester would have the FBI search every filing system in every field office across the country); *Marks*, 578 F.2d at 263 (requester would have the FBI search every field office across the country); *Dale*, 238 F. Supp. 2d 99 at 105 (requester would have the IRS search every field office across the country).

[25] Obviously this language is broader than the suggested search plan discussed *supra*.

> No identifiable record contains information on detentions sought by plaintiff but instead such information is dispersed in many individual files, some of which are in storage. Assembling this information would require the search of many files and be extremely burdensome.
>
> This statement leaves no doubt that the defendant knows what information is being sought. This is all that the identifiability requirement contemplates. The fact that to find the material would be a difficult or time-consuming task is of no importance in making this determination; an agency may make such charges for this work as permitted by the statute. To deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert Congressional intent to say the least. Therefore, this court finds the defendant's assertion that this requested information is not an 'identifiable record' within the meaning of the statute to be totally without merit.

Id.

Clearly, Category One is neither unreasonably broad nor unduly burdensome according to *Wellford.* JMP does not dispute the CIA's assertion that there is "no reasonable way for CIA to limit a search . . . to a select group of CIA offices." Nelson Decl. at ¶ 19. However, the Nelson Declaration cites this inability to confine its search "to a subset of all CIA offices," *id.* at ¶ 15, throughout the analysis of the request, as though requesters are required to confine their requests to only *some* of the CIA or face rejection of their request. Nevertheless, repetition of a "rule" with no statutory or regulatory authority behind it carries no weight, no matter how many times the CIA asserts it. To the contrary, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby*, 920 F.2d at 68. The CIA cites *Oglesby* for the premise that "there is no requirement that an agency search every record system," *id.*, but that rule should be taken in the context in which it was written, in which the argument was being made that an agency *must* search *every* record system for *every* request. *See id.* (citing *Marks* for the rule that there is "no requirement that an agency search every division or field office *on its own initiative* in response to a FOIA request *when the agency believes responsive documents are likely to*

be located in one place." (emphasis added)). The CIA's incorrect interpretation of *Marks* and *Oglesby* has led to this nonsensical "rule," which clearly has led to the action resulting in this litigation.[26]

Before concluding the analysis of Category One, it is necessary to address the pervasive mischaracterization with respect to the scope of JMP's request alleged in Note 12 *supra*. According to the Nelson Declaration, "this all-encompassing, Agency-wide search would entail a *page-by-page review* of *each and every paper and electronic record* of *each office* to determine whether the particular record did, in fact, contain information 'pertaining to' any of the items described in 1 through 4 of Plaintiff's request. Nelson Decl. at ¶ 15. This belief is a completely unreasonable interpretation of the meaning of "pertaining to" and resembles a regrettable attempt to shoehorn this request into the class of requests covered by *Am. Fed'n of Gov't Employees, Local 2782*. It is likewise disingenuous for the CIA to posture a philosophical footnote from *Commonwealth of Mass. v. U.S. Dep't of Health & Human Serv*. to support the statement that requests for "all documents 'relating to' a subject is [*sic*] usually subject to criticism as overbroad since life, like law, is a 'seamless web,' and all documents 'relate' to others in some remote fashion." CIA's Memo at 8, *quoting* 727 F.Supp. 35, 36 n.2 (D.Mass. 1989). While this argument *might* have been applicable had JMP's request included the words "relating to," it clearly has no bearing on this case, since "pertaining to" is a commonly used term in legal proceedings and, in fact, has been judicially accepted in its own right in the context of FOIA requests. *See Nation Magazine, Washington Bureau v.*

[26] The surreal nature of this case is not lost on JMP. *Marks*, one of the primary cases cited by the CIA, stands for the rule that agencies aren't required to search places they don't have to when *they know where the records are*, and the Nelson Declaration is quite adamant about how certain the CIA is that *every component will possess responsive records*.

U.S. Customs Serv., 71 F.3d at 891 ("The words 'pertaining to,' coupled with the inclusion of [relevant] references . . . in the materials appended to the request letter, were sufficient to alert the agency that appellants sought information about Perot, even if it was not indexed under his name.").

In conclusion, the Nelson Declaration is in bad faith for the following reasons:

1) It feigns confusion over the plain meaning of the phrase "systems of records" and alleges that the CIA cannot understand any definition other than the statutory language of the Privacy Act, despite usage of virtually identical phrasing in CIA documents and proposed rules and the presence of explanatory context in the JMP comment attached to the request.

2) It deliberately adopts a overbroad definition of "pertaining to" despite the common usage of the language and acknowledgement by the court of its importance in *Nation Magazine, Washington Bureau.*

3) It repeatedly cites a policy requiring that a request be deemed *per se* not to be reasonably descriptive if the CIA is unable to limit the search to a subset of its offices, despite the fact that this "rule" is in direct violation of *Oglesby* (a CIA case) and has no basis in statute or regulation.

Therefore, pursuant to *Goland*, the Nelson Declaration should be found to be in bad faith and disregarded. *See Goland*, 607 F.2d at 352.

2. Category Three of JMP's Request Reasonably Described the Records Sought[27]

In Category Three, JMP requested "all internal [CIA] documents pertaining to . . . which CIA components are tasked with FOIA requests by CIA Information Management

[27] Without conceding any points with respect to the CIA's arguments, JMP has decided as an administrative matter to withdraw Category Two from this litigation. No legal inferences should be drawn from this decision.

Services ('IMS'), especially with respect to which CIA offices are considered 'components' by IMS for tasking purposes." Nelson Decl. at 6. The CIA argues that the records sought were not reasonably described due to vagueness, broadness, that they sought answers to questions, and that any search for responsive records would be unduly burdensome. CIA's Memo at 12-13.

a) Category Three Does Not Require the Agency to Answer Questions

Both parties are in agreement that, according to *Hudgins*, a request is not "reasonably described" when it "requires an agency to answer questions disguised as a FOIA request. 620 F.Supp. at 21. However, *Hudgins* was another fact-driven decision, and the magnitude of the weakly disguised questions is clear from an analysis of the case. *Hudgins* was truly a stellar example of how *not* to draft a FOIA request, and the CIA's parenthetical summary of it does not do it justice. The case involved a FOIA request for documents describing

> 1) the purpose for which an individual's social security number, required to be disclosed on federal tax returns, is used in terms of rights, benefits and privileges related to the Social Security Program, 2) the effects, in terms of rights, benefits and privileges under the Social Security Program, of failing to provide the social security number, and 3) whether a social security number is required on a federal tax return to obtain a benefit under the Social Security Program.

Id. at 20. Reviewing this awkward, convoluted request, the court found that because "FOIA neither requires an agency to answer questions disguised as a FOIA request or to create documents or opinions in response to an individual's request for information, the IRS employees processing the request 'could not comprehend the nature of any *records* responsive to the request, as discernable from a general fishing expedition for answers to questions.'" *Id.* at 22.

In contrast, despite the CIA's allegation that Category Three actually consists of two questions cleverly disguised as a FOIA request,[28] this is a tautological argument, because it is possible to read implicit questions into *any* FOIA request, especially when the request is for a narrowly defined class of records.[29] With that being said, there is no way for JMP to disprove this allegation; that's the beauty of a tautological argument. Therefore, JMP simply asks the Court to use its common sense with respect to this issue.

b) Category Three of JMP's Request Was Not Unreasonably Vague and an Agency Search for Responsive Records Would Not Constitute an Unreasonably Onerous Search of a Large Amount of Records and Would Not Impose an Undue Burden on the Agency

As this issue has already been briefed in depth in Section I(D)(1) *supra*, the argument will simply be restated that according to the CIA's clear understanding of the nature of the records described (as evidenced most plainly by the Nelson Declaration) and the straightforward nature of a search for responsive records discussed in Section I(D)(1)(a) *supra*, as well as the clear applicability of *Bristol-Myers* and *Wellford* to this case, this request reasonably described the records sought, did not require an unreasonably onerous search, and would not impose an undue burden on the CIA. In fact, of all three categories remaining at issue, Category Three involves the least amount of work on the part of the CIA, since, contrary to the assertion that a search for

[28] "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." CIA's Memo at 12.

[29] Consider a fanciful request for "all records pertaining to the CIA's interactions with Lee Harvey Oswald and a false defector program." This request could easily be construed to be asking the CIA to first answer the question of whether it actually *had* any involvement with either Oswald or a false defector program before processing could begin. The mere logical existence of a *possible* implicit question should not outweigh JMP's explicitly stated intentions to the contrary. Zaid Decl. at ¶ 17.

responsive records would necessarily require "each component which had ever been tasked with a FOIA search to review its files on all prior FOIA requests," CIA's Memo at 13 (citing the perceived all-encompassing quality of the phrase "pertaining to"), only the ICOs would have to be tasked to search for these records.

3. Category Four of JMP's Request Reasonably Described the Records Sought

In Category Four, JMP requested "all internal [CIA] documents pertaining to . . . the search tools and indices employed by each CIA component from (3) above when processing FOIA requests." Nelson Decl. at 6. The CIA argues that the records sought were not reasonably described due to vagueness, broadness, and that any search for responsive records would be unduly burdensome. CIA's Memo at 13-14. As this issue has already been briefed in depth *supra*, the argument will simply be restated that according to the CIA's clear understanding of the nature of the records described (as evidenced most plainly by the Nelson Declaration) and the straightforward nature of a search for responsive records discussed in Section I(D)(1)(a) *supra*, as well as the clear applicability of *Bristol-Myers* and *Wellford* to this case, this request reasonably described the records sought, did not require an unreasonably onerous search, and would not impose an undue burden on the CIA.

II. ALTERNATIVELY, JMP IS ENTITLED TO CONDUCT LIMITED DISCOVERY TO ASCERTAIN THE PROPER SCOPE OF ITS RESPONSE

Discovery is a permissible and useful tool in the proper judicial administration of the FOIA with regard to agency searches that are inadequate. *See Founding Church of Scientology*, 610 F.2d at 836-37. Since in most FOIA cases the government possesses all of the relevant evidence, it is permissible to use discovery to uncover facts to determine the adequacy of the government's search or the exempt status of requested documents.

See Weisberg v. Webster, 749 F.2d 864, 868 (D.C. Cir. 1984).[30] Given the insufficiency of the CIA's affidavits and the subsequent inability by the CIA to demonstrate that the request did not reasonably describe the records sought, discovery is necessary and permitted.

Federal courts are arguably replete with case law that supports the notion that discovery can be required to address the insufficiency of an agency's affidavits regarding the adequacy of a search. *See, e.g., Oglesby*, 902 F.2d at 71 (vacating district court's grant of summary judgment to defendant agency and remanding for further findings regarding adequacy of search); *Weisberg*, 705 F.2d at 1348 (permitting discovery to resolve material factual dispute regarding adequacy of search); *Perry*, 684 F.2d at 124-25 (awarding summary judgment to defendant agency only after the agency had been forced to conduct two additional searches pursuant to judicial order); *Western Ctr. for Journalism v. I.R.S.*, 116 F.Supp.2d 1, 5-6 (D.D.C. 2000) (awarding summary judgment only after defendant agency had conducted an additional search subsequent to its original motion for summary judgment and released an additional 658 pages of responsive records).

The permissibility of discovery in relation to exemption claims is no different. *See, e.g., Tax Analysts*, 214 F.3d at 185 (determining that discovery necessary to develop factual record); *Schaffer v. Kissinger*, 505 F.2d 389, 391 (D.C. Cir. 1974) (reversing and remanding district court's grant of summary judgment with instructions that plaintiffs be permitted to undertake discovery relating to whether the records in question had been "properly classified" in accordance with an Executive Order as is required by the terms of

[30] While the court was addressing the particular right of the government to utilize discovery, it affirmed that right by stating that the government, "like any other litigant," should be able to utilize the rules of discovery. *Weisberg*, 749 F.2d at 868.

Exemption 1). Courts are to "require the agency to create as full a public record as possible concerning the nature of the documents and the *justification* for nondisclosure." *Hayden*, 608 F.2d at 1384 (emphasis added). If the agency's affidavits are insufficient, the Court is permitted to "conduct a detailed inquiry into whether it agrees with the agency's opinions . . . ." *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980). At least one court has even used the opportunity to simply order the disclosure of relevant records. *Powell v. U.S. Dep't of Justice,* No. C-82-326, slip op. at 8 (N.D.Cal. Mar. 27, 1985) (district court ordered disclosure of classified information because it was "convinced [that] disclosure of this information poses no threat to national security.").

Given the previously-detailed insufficiency of the CIA's affidavits in relation to the justifications for invoking Exemption Three, the need for discovery on this end is both permissible and necessary.

Discovery does not need to be overly burdensome or excessive in scope. At a minimum, supplemental CIA affidavits could fill at least some of the evidentiary gaps identified by JMP. In addition, a limited number of interrogatories and depositions will be necessary to identify the full scope of responsive documents that exist and assess whether after remand the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information. Zaid Decl. at ¶¶ 18-19. Similarly limited discovery will also be necessary to ascertain the appropriateness of the CIA's invocations of Exemption Three. *Id.*

CONCLUSION

For the foregoing reasons, the CIA's Motion for Summary Judgment should be denied, remanding the case to CIA to perform the requested searches, or, alternatively, JMP should be permitted to undertake limited discovery.

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Respectfully submitted,

/s/

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Neal A. Puckett, Esq.
VA Bar #44699
Puckett & Faraj, P.C.
2181 Jamieson Avenue
Suite 1505
Alexandria, VA 22314

Kelly B. McClanahan, Esq.
Admitted Pro hac vice
DC Bar #984704
Mark S. Zaid, P.C.
1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Attorneys for Plaintiff