

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSASSINATION ARCHIVES AND
RESEARCH CENTER, INC., *et al.*

Appellants,

v.

No. 23- 5064
(C.A. No. 21-1237 CRC)

CENTRAL INTELLIGENCE AGENCY

Appellee.

**APPELLANTS AARC AND LESAR’S RESPONSE OPPOSING CIA’S
MOTION FOR SUMMARY AFFIRMANCE**

Appellants Assassination Archives and Research Center (“AARC” or “Assassination Archives”) and James H. Lesar hereby file their response opposing CIA’s motion for summary affirmance in this case.

PRELIMINARY MATTER

This case arises under the Freedom of Information Act, 5 U.S.C. Sec. 552(a). As a preliminary matter the docket sheets forwarded to this court by the district court were labeled “Internal Use Only”. This appears to be an improper restriction on access to the docket sheets, which are public documents. Inquiry to the district court clerk’s office did not yield an explanation other than that there had been recent changes to the ECF system. These docket sheets are part of the record of

this case in the lower court and this court by action of the district court clerk's office. ECF #30 DDC; Doc.1991780 DCCir.

BACKGROUND

Appellants' Freedom of Information Act ("FOIA") request seeks information Appellants believe, based on decades of experience, to be among the most promising leads to solving the 1963 assassination of President Kennedy.

Appellant Assassination Archives and Research Center ("AARC") is a non-profit, non-stock corporation, organized in 1984 under Section 501(c) of the Internal Revenue code. AARC is committed to collecting, preserving and making available to the public research materials relating to political assassinations and related subjects; conducting research and seminars in the field of political assassinations, and publishing and disseminating scientific and public information concerning political assassinations and related subjects.

As part of its research and public information functions, AARC uses government records made available to it under the FOIA. AARC's archive contains the largest collection of materials on the assassination of President John F. Kennedy in private hands. AARC does not espouse or support a particular theory about the assassination of President Kennedy. Appellant James H. Lesar is a private citizen and attorney and is Founder emeritus of the AARC. Mr. Lesar has

devoted decades of study and research as to the circumstances of the assassination of President Kennedy.

Appellants' FOIA request seeks records related to (1) the owner of the Texas School Book Depository building in 1963, David Harold Byrd¹; (2) Byrd's African safari hunting host and guest visitor to Dallas in late 1963, Werner von Alvensleben, who according to released CIA predecessor organization Office of Strategic Services ("OSS") records had served as an assassin for the Nazi leader Heinrich Himmler in Germany in 1933. OSS document, 9/28/1945, R.21-1, para. 1(c); and (3) the 1954 Doolittle Report that recommended that the CIA be permitted to act ruthlessly and beyond the norms of civilized human conduct to achieve its goals in the Cold War. Doolittle Report, R. 21-4, Doc. C03066212, pp. 61-62 of Exh. 4 (pp 2-3 of the Report) (pagination added to Exhibit in lower right corner of pages. R. stands for Record and refers to the docket entries in the district court).

¹ President Kennedy was said to have been hit by bullets fired from the Texas School Book Depository building. At the time of the assassination David Harold Byrd owned that building. <https://www.washingtontimes.com/news/2006/may/02/20060502-103326-3519r/> David Harold Byrd was a cousin of U.S. Senator Harry Byrd, Sr. of Virginia and his brother, U.S. Navy Admiral Richard E. Byrd. Sen. Byrd led the "Massive Resistance" strategy to the *Brown v. Bd. Of Education* school integration decision (347 U.S. 483 (1954)). David Harold Byrd financially supported Admiral Byrd's explorations of Antarctica. In appreciation Admiral Byrd named a mountain range in Antarctica the Harold Byrd Mountains. *"I'm an Endangered Species: The Autobiography of a Free Enterpriser"*, David Harold Byrd, Pacesetter Press, Houston, Texas, 1978, pages 3, 97-98.

The chair of the Doolittle commission was General James Doolittle, who was a self-described substantial friend of David Harold Byrd. R. 1-1 p.4 Obituary. CIA is so sensitive about the 68-year old Doolittle Report that in this case CIA claims that in 191 pages of records dated 1955 related to key portions of that report not a single word can be released to the public. *Vaughn* index, R. 19-2 p. 17, Denied in Full Records- document C02152332- 35 pages; C02384822- 131 pages, C02384828- 18 pages; C03298720- 7 pages.

Specifically, Appellants AARC and Lesar's FOIA request dated July 4, 2020, attached to the complaint (ECF #1-1) asks for the following records or information (CIA's statement of the request is partial and leaves out most detail and context):

1. Search for and release all records or information in any format related to David Harold Byrd (deceased) of Dallas, Texas. Mr. Byrd died on September 14, 1986 (see attached obituary from the Dallas Times-Herald). Mr. Byrd owned the Texas School Book Depository **Building** at the time of the assassination of President Kennedy in 1963, and reportedly removed the "sniper's window" from the building after the assassination and displayed it in his mansion. Mr. Byrd was an owner and financier of government contracting companies including Texas Engineering Manufacturing Company (TEMCO), E-Systems, and Ling-TEMCO-Vaught (LTV). E-Systems was well known as a CIA contractor, so much so that in 1975 CIA solicited E-Systems to purchase its proprietary airline, Air America. David Harold Byrd was also active in the oil business and varied other business enterprises. David Harold Byrd co-founded the Civil Air Patrol (CAP) in 1941 and served in command capacities in CAP until the early 1960's. The Civil Air Patrol is the official auxiliary of the US Air Force. In the 1950's Mr. Byrd served with Cord Meyer, Sr. on the national executive board of CAP (Cord Meyer, Jr. was a ranking CIA executive).

2. Search for and release all records and information in any format related to Werner von Alvensleben, Jr. (died 1998), of Mozambique (formerly Portuguese East Africa). Mr. Alvensleben owned and operated the big game hunting company named Safarilandia in Portuguese East Africa, later Mozambique. According to released Office of Strategic Services (OSS) records, Mr. Alvensleben served as a valued double agent for OSS during World War II in Portuguese East Africa. OSS records state that Mr. Alvensleben was a member of the Bavarian Military Police in 1933, headed by Heinrich Himmler (the Bavarian Military Police became the Nazi SS, according to OSS records). In 1933 Mr. Alvensleben was sent to Austria to participate in the assassination of an Austrian official. Mr. Alvensleben was arrested by the Austrians and imprisoned for this activity. According to reports in the Dallas Morning News, Mr. Alvensleben was in Dallas, Texas as a guest of David Harold Byrd in late 1963. Further, David Harold Byrd was reported to be present at Mr. Alvensleben's Safarilandia on November 22, 1963, the day of President Kennedy's murder. Due to Mr. Alvensleben's service as a valued double agent for OSS in World War II, it is likely that Mr. Alvensleben served as an asset of the CIA after the war, or had contact with the CIA.
3. Search for and release all records and information in any format related to the Doolittle Report of 1954 and its appendices A-D. The Doolittle Report was the result of a commission established by President Eisenhower to study the activities of the CIA and headed by General James Doolittle. The Doolittle Report called for more aggressive CIA covert activities that had previously been believed to be repugnant and contrary to American values. Requesters seek full release of the requested materials. As shown in the attached obituary of David Harold Byrd, General Doolittle and Mr. Byrd were substantial friends who shared an interest in aviation from the early years. Mr. Byrd and General Doolittle were Safari hunting partners on several occasions.

AARC and Lesar received no response or determination on their request even though the U.S. Postal Service tracking system showed that the request had been delivered to CIA on July 9, 2020. After receiving no response for over nine months AARC filed this action on May 6, 2021.

CIA initially contended that it had not received AARC's FOIA request. R.9, para. 2. AARC's counsel sought information from the post office where the request had been mailed, McLean, Virginia 22101. That post office provided him with a document from the U.S. Postal service intranet showing that a CIA representative signed for receipt of AARC's request including a scan of his signature. AARC's counsel provided this information to government counsel, and as a result CIA reversed its position and admitted that it had received AARC's request. R. 10, para. 17, CIA Answer.

Subsequently CIA released records to AARC and Lesar responsive to their request, referred other documents to other agencies for response, and withheld a large quantity of records related to the Doolittle Report. Document releases are at R.21-2 Exhibit 2 (CIA first release October 19, 2021); R.21-3 Exhibit 3 (FBI Direct Referral response Dec. 16, 2021); R.21-4 Exhibit 4 (CIA 2nd Release Dec. 22, 2021); R.21-5 Exhibit 5 (Dept. of State Response March 2022). The Doolittle Report is document # C03066212 in R.21-4 Exhibit 4, at page 56 of the December 22, 2021 release. CIA has refused to search its operational files in response to AARC's request even though these files are the most likely to contain records that will shine light on the circumstances of the assassination of President Kennedy.

Through its FOIA requests, AARC is attempting to find and reveal additional information to fill out the public record. This Court has properly recognized the

high public interest in the subject of the Kennedy assassination, stating, “(w)here that subject is the Kennedy assassination — an event with few rivals in national trauma and in the array of passionately held conflicting explanations — showing potential public value is relatively easy.” Morley v. Central Intelligence Agency, 810 F.3d 841,844 (D.C.Cir. 2016).

ARGUMENT

I. THIS CASE IS NOT APPROPRIATE FOR SUMMARY AFFIRMANCE.

A party seeking summary disposition on appeal “bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified.” Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987), citing Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1987) (per curiam), cert. denied, 449 U.S. 994 (1980); United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1969).

In order to summarily affirm the District Court, this Court “must conclude that no benefit will be gained from further briefing and argument of the issues presented.” Taxpayers Watchdog, *supra*, at 298 (emphasis added), citing Sills v. Bureau of Prisons, 761 F.2d 792, 793-794 (D.C. Cir. 1985). Moreover, this Court is obligated to review the record and the inferences to be drawn

therefrom in the light most favorable to the party opposing summary

disposition. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). For the reasons that follow this case is not appropriate for summary disposition.

II. CIA MUST BE ORDERED TO SEARCH ITS OPERATIONAL FILES FOR RESPONSIVE RECORDS.

The subject matter of AARC and Lesar's request, the assassination of President Kennedy, is not exempt from search of operational files under FOIA due to the CIA Information Act of 1984 (50 USC §3141(c)(3)). Contrary to the district court's ruling (Op. p. 6), Appellants' request satisfies the caselaw in this court that requires CIA to search its operational files. The D.C. Circuit has held that the exemption from search does not apply to matters investigated by the Senate Select Committee on Government Operations With Respect to Intelligence Activities ("Church Committee") and that the scope of the Church Committee investigation specifically encompassed operations of the CIA and other federal agencies in investigating the assassination of President Kennedy. Church Committee, *The Investigation of the Assassination of President John F. Kennedy: Performance of the Intelligence Agencies*, S.Rep. No. 94-755, Book V, at 1 (1976), R. 21-7; Morley v. CIA, 508 F. 3d 1108, 1117 (D.C.Cir. 2007).

Further, the assassination of President Kennedy was the specific subject of an investigation by the Department of Justice at the time and a Presidential

Commission, the Warren Commission, which was assisted by the Department of Justice. The operational files search exemption does not extend to investigations by the Department of Justice by the textual language of 50 U.S.C. §3141(c)(3).

In addition, former CIA Director Richard Helms has publicly stated that CIA initiated an investigation of the assassination of President Kennedy that began with an effort to find out if CIA operatives were in Dallas at the time of the assassination. <https://www.youtube.com/watch?v=e3nDUEgh05o>

Government investigative agencies, and in particular the CIA, did not inform the Warren Commission about plots to kill Fidel Castro undertaken or developed by U.S. government agencies. R. 21-8, Foreword by former President Gerald R. Ford (member of the Warren Commission), “A Presidential Legacy and The Warren Commission”, FlatSigned Press, Nashville, TN, 2007, p. XXII. All of these matters are subject to FOIA search under the terms of 50 U.S.C. §3141(c)(3).

In addition, CIA plots to assassinate Fidel Castro that may have been related to the assassination of President Kennedy were the specific subject of an investigation by the Inspector General (“IG”) of the CIA ordered by President Johnson in 1967. CIA IG Report on Plots to Assassinate Fidel Castro dated May 23 1967 R.21-9. Such Inspector General investigations are also exceptions from the FOIA search exemption of 50 U.S.C. §3141(c)(3) and by language of that statute FOIA searches must be conducted for such records or information.

This Court held in Morley that the requirement of § 431(c)(3) that a FOIA request concern “the specific subject matter of an investigation” is satisfied where the investigating committee would have deemed the records at issue to be central to its inquiry. 508 F.3d 1108,1118. All of the investigations cited above considered the specific subject matter of who may have assassinated President Kennedy as central to their inquiries as well as whether government intelligence agencies committed any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

Further as a valuable double agent for OSS during World War II, Werner von Alvensleben would have been a prime candidate to serve as a CIA asset in Portuguese East Africa (Mozambique) after the war. R. 21-2, OSS Documents. The Doolittle Report describes OSS World War II veterans as CIA’s invaluable asset in forming a hard core of capable men from World War II to build the Cold War CIA. Doolittle Report, R.21-5, p. 77, doc.# C03066212 (pagination added in lower right corner of pages).

D. Harold Byrd in addition to owning the Texas School Book Depository building was a defense contractor who was a principal of the Ling- Temco-Vaught conglomerate (“LTV”) in the 1960’s. LTV and its subcomponent E-Systems were large scale defense contractors that had CIA contracts as part of their business portfolios. Byrd was a substantial personal friend and safari partner of General

Jimmy Doolittle,² who was called upon in 1954 by President Eisenhower to conduct a Top Secret study of CIA covert operations with a purpose to strengthening them. The Doolittle Report called for increased CIA covert operations and warned that the American public might have to be educated that American values of fair play needed to be dispensed with in the Cold War (“(t)here are no rules in such a game”). The Doolittle Report called for a CIA "if necessary, more ruthless than that employed by the enemy." Doolittle Report, R.21-5, pp. 61-62 Doc. #C03066212. Thus Byrd and von Alvensleben had a history of intelligence activities and are prime subjects for government investigation for improprieties or violations of law, Executive Order or Presidential directive during intelligence activities related to the Kennedy assassination.

Further, the House of Representative Select Committee on Assassinations investigated performance of the intelligence agencies as part of its investigation of the assassination of President Kennedy. And the Congress of the United States unanimously passed a law in 1992, enacted by the President, requiring the expeditious release to the public of all government records related to the assassination of President Kennedy and investigations of the assassination. President John F. Kennedy Records Collection Act of 1992, codified at 44 U.S.C. §2107 notes. There can be no doubt that all of these investigations would have

² “I’m an Endangered Species: The Autobiography of a Free Enterpriser”, David Harold Byrd, Pacesetter Press, Houston, Texas, 1978, page 40.

deemed the requested records central to their inquiry and thus searchable. Morley, 508 F.3d 1108,1118.

Yet despite the caselaw requiring CIA to search its operational files, the government in this case studiously avoids searching for the information requested by Appellants. That information is that a convicted Nazi assassin and U.S. intelligence asset was in the company of the owner of the Texas School Book Depository building at the time of the assassination of President Kennedy, and was the guest of the owner of the building in Dallas in late 1963 and early 1964 (R.21-10- *Dallas Morning News* articles from January 9 and 19th 1964 reporting Werner von Alvensleben's visit to Dallas as guest of D. Harold Byrd). And in addition to his service to the U.S. as a double agent, this convicted assassin came from a family in which his father was reported to U.S. intelligence to be a specialist in political assassinations after World War I in Germany.³

Further the owner of the Texas School Book Depository building was deeply involved with secret defense and intelligence activities through the Temco, Ling-

³ The father, also named Werner von Alvensleben, appears in the authoritative work on Nazi Germany, "The Rise and Fall of the Third Reich" by William L. Shirer. This Werner von Alvensleben (father) was present with Adolf Hitler in Berlin the night in 1933 when Hitler was informed he would be named Chancellor of Germany. Von Alvensleben precipitated a crisis by inaccurately informing Hitler that a coup was being undertaken to prevent Hitler from coming to power. Hitler called out the SA Brown Shirts and the police to prevent such a coup, according to Shirer, and Hitler then took power as Chancellor the next day. Page 182, "The Rise and Fall of the Third Reich", William L. Shirer, Simon and Shuster, New York 1960. Werner von Alvensleben, Jr. was not a titled Baron despite frequent references to him using that title. Publisher's Note, *Baron in Africa*, Brian Marsh, Safari Press, Inc. 2001 page xv.

Temco-Vaught, and E-Systems companies, and his relationship with General Doolittle. The government adopts the evasion that because these facts were alleged to be unknown to investigators in 1963 and the leads were developed later by private citizens, the matter is not one for exploration by FOIA. The government's position ignores the purpose of all the investigations of the assassination- to find the assassin or assassins of President Kennedy and any who assisted them. The government's position is that if assassins were successful in covering their tracks, then the FOIA cannot be used to find the assassins. The transparency purpose of the FOIA is thus defeated.

The government has access to the records needed to search for this information, such as CIA operational files and visa information from 1963-64, and CIA contracting information for these companies. Werner von Alvensleben and D. Harold Byrd's CIA records should be reviewed, as well as contracting files for the Byrd related companies.

In 1963 Werner von Alvensleben, convicted in 1933 of attempted assassination on behalf of the Nazis in Austria, headed a large hunting preserve in Portuguese East Africa (Mozambique) called Safarilandia. Multiple reports in hunting and gun publications state that Werner von Alvensleben was legendary for

using a 6.5 mm Mannlicher-Schoenauer rifle for his hunting activities.⁴ The rifle found on the sixth floor of the TSBD and alleged to be connected to the assassination of President Kennedy was a 6.5 mm Mannlicher-Carcano. Warren Commissioner John McCloy questioned the FBI firearms expert who testified before the Warren Commission in 1964 as to whether the ammunition found in the Mannlicher-Carcano and on the floor at the TSBD could be fired from a Mannlicher-Schoenauer rifle (ammunition for the Mannlicher-Carcano and Mannlicher-Schoenauer are said to be virtually identical). The FBI firearms expert said he did not know the answer to the question. Warren Commissioner McCloy stated that he was familiar with the Mannlicher-Schoenauer rifle in that it was the preferred sporting rifle in Austria and that he owned one.⁵ Further, Commissioner McCloy specifically questioned the FBI firearms expert as to the diameter of the bullet found in the TSBD building. FBI expert Frazier gave McCloy a diameter of 6.65 millimeters, which is too small a diameter for a Mannlicher-Carcano bullet, but is consistent with the reportedly slightly smaller Mannlicher-Schoenauer bullet.

The government does not contest plaintiff's statement in their request that the owner of the Texas School Book Depository building Byrd had the "sniper's

⁴ The Daily Caller, 8-12-2015, <http://dailycaller.com/2015/08/12/gun-test-alexander-arms-6-5-grendel-hunter/> ("Hunting history is rife with the tales of derring-do with 6.5mm cartridges. W.D.M. Bell whacked many elephants and Werner von Alvensleben slew hundreds of buffalo with what they termed a "small-bore rifle," namely, the 6.5×54 Mannlicher-Schönauer"). Read more: <http://dailycaller.com/2015/08/12/gun-test-alexander-arms-6-5-grendel-hunter/#ixzz49IeXGBzJ>

⁵ Warren Commission Testimony of FBI Firearms expert Frazier, R. 21-11: Vol. 3 Warren Commission documents, page 399.

window” removed from the building after the assassination and displayed in his Dallas mansion where it became the focus of high-powered Dallas social events⁶.

In addition the government does not deny that there has been no investigation or search for relevant records of the presence of a convicted Nazi assassin in Dallas in late 1963 and early 1964 in the company of the owner of the TSBD building in the circumstances described above, despite several attempts to investigate the assassination. Summary affirmance is inappropriate given this inconclusive state of affairs.

III. CIA HAS NOT CONDUCTED AN ADEQUATE SEARCH.

This Court has strongly restated that decisions in this circuit have long held that agency declarations must describe in detail how searches were conducted, including search terms that were used, and results yielded in the search of each component of an agency. Reporter’s Committee for Freedom of the Press v. FBI, D.C. Circuit Case No. 17-5042, 2017 WL 6390484 (D.C. Cir. Dec. 15, 2017) pp. 7-8 slip opinion, 877 F.3d 399 (D.C. Cir. 2017).

This Court emphasized that summary judgment is inappropriate where as here “a review of the record raises substantial doubt” as to the search’s adequacy, “particularly in view of ‘well defined requests and positive indications of overlooked materials.’” Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326

⁶ “Famed Oswald Window” *Washington Times*, May 2, 2006
<https://www.washingtontimes.com/news/2006/may/02/20060502-103326-3519r/>

(D.C. Cir. 1999) (quoting Founding Church of Scientology v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979)). “We review de novo the adequacy of the [agency’s] search.” DiBacco v. U.S. Army, 795 F.3d 178, 188 (D.C. Cir. 2015). Reporter’s Committee, p. 4 slip opinion.

Further, CIA initially contended that it had not received AARC’s FOIA request. R.9, para. 2. AARC’s counsel sought information from the post office where the request had been mailed, McLean, Virginia 22101. That post office provided him with a document from the U.S. Postal service intranet showing that a CIA representative signed for receipt of AARC’s request including a scan of his signature. AARC’s counsel provided this information to government counsel, and as a result CIA reversed its position and admitted that it had received AARC’s request. R. 10, para. 17, CIA Answer. Yet the CIA provided no information on the subject in its declarations and the district court refused to permit discovery on the issue. CIA’s credibility in conducting the search is called into question by such behavior.

IV. CIA’s EXEMPTION 1 CLAIM FAILS

The district court was not convinced that CIA’s b(1) claims should be upheld. Page 8, Memorandum opinion R.28. CIA now appears to have abandoned its b(1) arguments. CIA had claimed a b(1) national security exemption for records that

are in excess of 50 years old, despite the provisions of Executive Order 13526 Sec. 3.3 that mandate automatic declassification for material over 50 years in age. CIA now shifts to a b(3) argument, thus demonstrating in its handling of its b(1) claim CIA's propensity to claim national security exemptions to which it is not entitled.

V. CIA's EXEMPTION 3 CLAIM FAILS

Because the aged records at issue under exemption b(3) are properly automatically declassified under EO 13526, Sec. 3.3, CIA's b(3) exemption claims also fail. The executive order reflects Presidential authority over the CIA on matters of classification and declassification. Records automatically declassified under the executive order are properly authorized for release and not subject to a b(3) exemption claim. This is pursuant to the *National Security Act of 1947* ("NSA Act") 50 U.S.C. §3024(i), which by its text guards against unauthorized disclosure (emphasis added).

EO 13526 was signed by President Obama in 2009, well after the 1985 CIA v. Sims case cited by the CIA. 471 U.S. 159. The later promulgated Executive order can be assumed to have been issued in full knowledge of Sims. In any event the Sims case did not decide the automatic declassification issues raised by the later Executive order 13526 which applied automatic declassification to records 25 and 50 years old. Automatic declassification was not part Executive order 12356 that was in effect when Sims was argued and decided in 1985. EO12356 had been

signed in 1982. Rather automatic declassification at 25 and 50 years was first ordered by President Clinton in 1995 in Executive Order 12958, and its implementation was delayed by Clinton and then by President George W. Bush in 2003 in Executive Order 13292. President Obama implemented automatic declassification in 2009 when he signed EO 13526.

To uphold CIA's position would require deciding that Executive Order 13526 was meaningless and did not intend to achieve what it said by its textual terms. CIA's position argues that automatic declassification was an empty gesture by the Executive. Given that the Executive Order is in the field of national defense and foreign relations where the court has given considerable deference to the Executive, it would be wrong for a court to decide that the Executive Order did not mean what its text says in creating an automatic declassification system, resulting in authorized disclosure. Biden v. Texas, 597 US _____(2022) pp. 16,17.

If CIA were to fail to follow the provisions of Executive order 13526 on automatic classification, profound issues of democratic civilian control of the military and intelligence would be implicated.

VI. SUMMARY DISPOSITION OF THIS CASE IS NOT APPROPRIATE AS IT RAISES NOVEL ISSUES.

This case is also not a candidate for summary disposition because it raises issues of first impression. Parties should not seek summary disposition of cases raising issues of first impression. D.C. Circuit Hand-

book of Practice and Internal Procedure (2007) at 35.

Appellants have noted as a preliminary matter that the docket sheets forwarded to this court by the district court were labeled “Internal Use Only”. This appears to be an improper restriction on access to the docket sheets, which are public documents. Inquiry to the district court clerk’s office did not yield an explanation other than that there had been recent changes to the ECF system. This is a novel issue before this court and not appropriate for disposition by summary affirmance. These docket sheets are part of the record of this case in the lower court and this court by action of the district court clerk’s office. R.30 DDC; Doc.1991780 DCCir.

This case involves the novel issue as to whether the operational files exemption under FOIA requires secrecy for substantial leads in the assassination of the President, as covered in Argument I above. CIA argues that information about such leads arising from the assassination of the President not previously investigated must remain secret under the operational files exemption. CIA’s argument would facilitate the cover-up of such an assassination, a result the court should not countenance.

This case also raises the novel issue of whether aged documents that are automatically declassified by EO 13,526 due to their age can be withheld by a b(3) exemption claim by CIA, as the issue is set forth in Argument V above.

VII. THIS COURT REVIEWS THE DISTRICT COURT DISPOSITION OF THIS CASE DE NOVO.

This Court reviews the action of the district court in a Freedom of Information Act case *de novo*, and this review should not be performed in this case in a summary fashion. This Court has held that it is well-understood law that “[w]e review orders granting summary judgment *de novo*.” (citation omitted). This is so because in our review of decisions granting summary judgment we must decide the same question that was before the district court: “[t]hat is, we must determine whether there is on the record ‘no genuine issue as to any material fact.’” *Id.* (quoting Fed.R.Civ.P. 56(c)). Summers v. Dep't of Justice, 140 F.3d 1077, 1079 (D.C. Cir. 1998). This Court’s *de novo* review of a Freedom of Information Act case such as this one should not be conducted in a summary manner.

VIII. SEGREGABILITY

CIA is so sensitive about contents of the 68-year old Doolittle Report that in this case CIA claims that in 191 pages of records dated 1955 related to key portions of that report not a single word can be released to the public. *Vaughn* index, R. 19-2 p. 17 Denied in Full Records- C02152332- 35 pages, C02384822- 131 pages, C02384828- 18 pages, C03298720 7 pages. This claim is made despite the explicit language of the FOIA that “any reasonably segregable portion of a record shall be provided to any person requesting such record.” 5 USC §552(b).

This Court has held that a court must consider the segregability issue *sua sponte*. Morley v. CIA (“Morley II”), 508 F.3d 1108,1123 (D.C.Cir. 2007). The

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "[T]he District Court had an affirmative duty to consider the segregability issue *sua sponte*." Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022,1028 (D.C.Cir. 1999) Thus, "a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." PHE, Inc. v. Dep't. of Justice, 983 F.2d 248,252 (D.C.Cir. 1993).

Given the age of the records and the paucity of justification for such an extraordinarily broad withholding, CIA's actions are unreasonable and segregable material must be found and released. Due to the age of the records and the scale of total redaction, the district court should undertake an *in camera* review of the withheld documents as set forth in 5 U.S.C. §552(a)(4)(B) to determine if exemptions are properly claimed and whether segregable portions can be released as required by the FOIA statute cited above.

CONCLUSION

For the reasons stated above this case is not one in which summary affirmance is appropriate and CIA's motion for summary affirmance should be denied.

Respectfully submitted,

/s/ Daniel S. Alcorn
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CERTIFICATE OF COMPLIANCE FRAP 27(d)(2)(A)

The text for this Motion for Summary Affirmance was prepared using Times New Roman, 14 point, and contains 5,120 words as counted by Microsoft Word 2021. Dated August 17, 2023

/s/ Daniel S. Alcorn

Daniel S. Alcorn

CERTIFICATE OF SERVICE

Undersigned counsel for appellant has caused AARC's response opposing CIA's motion for summary affirmance to be served on counsel for the government by filing the response with the Court's Electronic Case Filing system on August 17, 2023.

/s/ Daniel S. Alcorn

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